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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 101

THE SEMINOLE NATION,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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INDEX

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Questions presented	4
Statement	6
Case L–51	6
Case L–208	10
Gratuity offsets	12
Specification of errors to be urged	13
As to Case L–51	13
As to Item II particularly	14
As to Item V particularly	16
As to Case L–208	19
As to Gratuity Offsets	20
Reasons for granting the writ	20
Case L–51	22
Item II	24
Item V	34
The 1889 Steal of the Brown Brothers	43
The Browns' Illegal Acquisition of Wewoka Townsite	44
The Loyal Seminole payment matter	48
The Browns' Arms Length Dealings with the Ignorant Members of the Seminole Nation	50
Case L–208	61
Gratuity Offsets	65
Conclusion	73

Citations

Cases:

Chickasaw Nation v. *United States*, 94 C. Cls. 215, 234	72
Creek Nation v. *United States*, 93 C. Cls. 1, 6	43
Crosier v. *Krupp*, 224 U. S. 290, 305	73
McCandless v. *Furland*, 296 U. S. 140, 165	10,23,55

Page

Meinhard v. *Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 546 57
Pepper v. *Litton*, 308 U. S. 295, 306-307 10,23
Richardson's Executor v. *Green*, 133 U. S. 30, 43 10,23,56
Seminole Nation v. *United States*, 316 U. S. 286 59
Seminole Nation v. *United States*, 316 U. S. 310 4
Seminole Nation v. *United States*, 92 C. Cls. 210, 212 .. 45,48
Shoshone Tribe v. *United States*, 299 U. S. 476, 494 72
Twin Lick Oil Co. v. *Marbury*, 91 U. S. 587, 588 56
United States v. *North American Co.*, 253 U. S. 330, 333. 71
United States v. *Creek Nation*, 295 U. S. 103 11,21

Statutes:

Act of:
March 3, 1873, c. 322, 17 Stat. 626 68
April 15, 1874, c. 97, 18 Stat. 29 15,29
August 5, 1882, c. 390, 22 Stat. 257, 265 5,12,65,68
March 2, 1889, c. 412, 25 Stat. 980, 1004 11,43,65
August 15, 1894, c. 290, 28 Stat. 286, 295 10,61,63
June 7, 1897, c. 3, 30 Stat. 62, 84 44
July 1, 1898, c. 542, 30 Stat. 567 (ratifying the Original Seminole Agreement) 16,17,44,65
May 31, 1900, c. 598, 31 Stat. 221, 247 11
March 3, 1905, c. 1479, 33 Stat. 1048, 1068 47
April 26, 1906, c. 1876, 34 Stat. 137, 140 48,58
May 20, 1924, c. 52, 43 Stat. 133 2
February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288, Jud. Code as amended, 28 U. S. C. A. 129) 2
August 12, 1935, c. 508, 49 Stat. 571, 596 2,12,20,22,65
August 16, 1937, c. 651, 50 Stat. 650 3
May 22, 1939, c. 140, 53 Stat. 752 2,3

Treaties:

Treaty of August 7, 1856, 11 Stat. 699 24,25
Treaty of March 21, 1866, 14 Stat. 755 11,12,65
Treaty of June 14, 1866, 14 Stat. 785 66

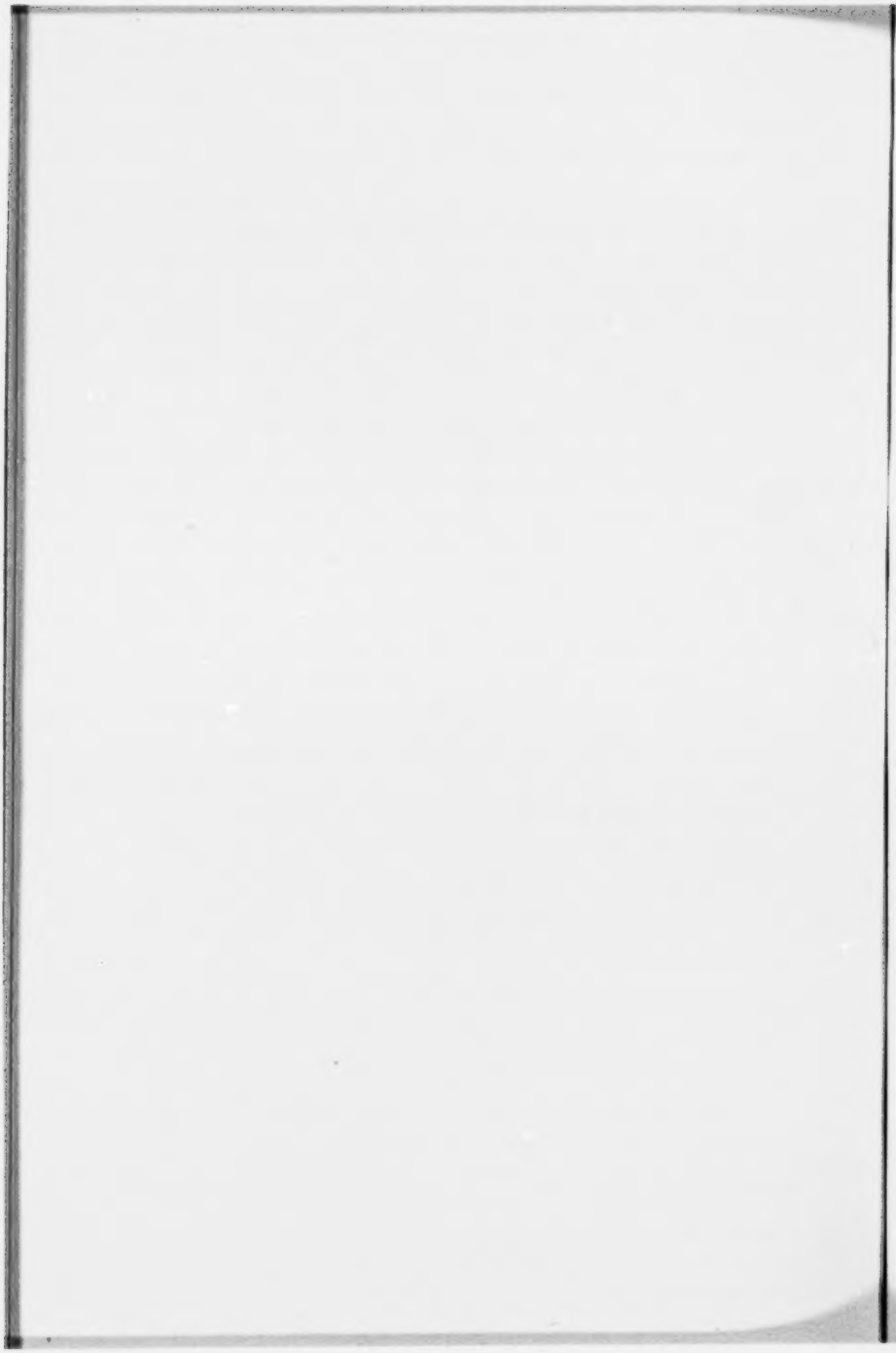
Miscellaneous:

20 Am. Jur., par. 141, p. 146 23
28 Cong. Rec. 2070 35
29 Cong. Rec. 1261 35,51

Page

II Kappler 915 26
Jones Comm. on Evidence, 2nd Ed., Vol. 2, pp. 1009, 1012 10,22
26 Ops. Attys Genl 340 58
Pomeroy's Equity Jurisdiction, 5th Ed., Vol. 3, par. 956, p. 790 10,23
10 R. C. L., par. 372, p. 1174 51
H. Doc. 5, 54 Cong., 1 Sess., pp. 87–88, Cong. Ser. 3382. 11,64
H. Doc. 5, 54 Cong., 2 Sess., p. 90, Cong. Ser. 3489.... 11,64
H. Doc. 5, 55 Cong., 3 Sess., p. 101, Cong. Ser. 3757... 11,64
H. Doc. Vol. 23, 57 Cong., 1 Sess., p. 231 (Op. Asst. Atty Genl, Willis Van Devanter, dated July 12, 1898). 53
H. Doc. 5, 58 Cong., 2 Sess., p. 280, Cong. Ser. 4645... 11,64
H. Doc. 5, 58 Cong., 3 Sess., pp. 67, 310, Cong. Ser. 4798 64
Sen. Ex. Doc. 75, 47 Cong., 1 Sess., p. 5 67
Sen. Doc. 105, 55 Cong., 2 Sess., pp. 3–4 53
Sen. Ex. Doc. 126, 51 Cong., 1 Sess., p. 9 67
Reports Commission to the Five Civilized Tribes:
Dated November 20, 1894, H. Ex. Doc. No. 1, Pt. 5, 53 Cong., 3 Sess., pp. LXIV–LXV, Cong. Ser. 3305 36
Dated November 18, 1895, H. Doc. Vol. 14, Doc. 5, 54 Cong., 1 Sess., pp. LXXX–LXXXIII, Cong. Ser. 3381 38
Dated November 28, 1896, H. Doc. Vol. 12, Doc. 5, 54 Cong., 2 Sess., p. CLIV, Cong. Ser. 3488.. 39
Dated October 11, 1897, H. Doc. Vol. 12, Doc. 5, 55 Cong., 2 Sess., p. CXIX, Cong. Ser. 3640... 40
Dated September 1, 1899, H. Doc. No. 5, 56 Cong., 1 Sess., p. CXVI, Cong. Ser. 3914 36

Reports Commissioner of Indian Affairs:
Year 1872, p. 241 63
1901, p. 62–62 63
1902, p. 67 63
1903, p. 49 63
1904, p. 67 63
1905, p. 62 63
1906, p. 103 63



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OCTOBER TERM, 1945

No. 101

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Seminole Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above entitled cause on December 4, 1944 (R. 80).

Opinions Below

The opinions of the Court of Claims are not as yet reported (R. 15-80).

Jurisdiction

The judgment of the Court of Claims was entered on December 4, 1944 (R. 80). Motion for a new trial was overruled on March 5, 1945 (R. 80). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Judicial Code as amended, 28 U. S. C. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."
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> "Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, • • •."

The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides in part as follows:

> "In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or

submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; * * *"

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part:

"That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original jurisdictional Acts, as amended * * *."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

"In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the

papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

Questions Presented

In its decisions of May 11, 1942, 316 U. S. 286, 310, 316, this Court remanded these cases of the Seminole Nation (Nos. L-51 and L-208 in the lower court) to the Court of Claims with directions to consolidate them for retrial.

The questions presented in Case No. L-51 are:

1. Whether on the retrial the Court of Claims failed to apply the underlying principle established by this Court as the law of this case—that the conduct of the United States in its dealings with the Indians, should be judged by the most exacting fiduciary standards (316 U. S. 286, 296-297).

2. Whether in a case in which a fiduciary relationship exists between the parties, and the fairness of the transaction is challenged, the burden is upon the fiduciary to show the fairness of the transaction between him and his ward.

3. Whether there is a lack of substantial evidence to sustain the findings of fact of the lower court; whether said findings of fact are sustained by findings of evidentiary facts; and whether said court failed to make findings of

material facts on the issues outlined by this Court as follows:

(a) Whether the Seminole tribal officials were mulcting the Seminole Nation of its tribal income during the periods 1870-1874, and 1899-1907;

(b) Whether the United States had knowledge of such mulcting when its officers turned over the Seminole tribal income to said tribal officers for disbursement; and

(c) Whether the Seminole Nation received the benefit of any of said moneys thus turned over to said tribal officers.

The questions presented in Case No. L-208 are:

4. Whether the lower court used the proper basis for determining the reasonable market value of the lands in question; and whether there is any substantial evidence to support the finding of the lower court that the lands in question were worth but $7.00 per acre during the period over which patents were issued thereto—1892-1913.

5. Whether interest at the rate of 4 per centum per annum, allowed by the lower court—instead of 5 per centum per annum, as provided in treaties and agreements between the parties—is the suitable measure to be added to the values of the lands taken so as to produce the present full equivalent of that value paid contemporaneously with the taking.

6. Whether the computation of said interest at the rate of 4 per centum per annum is correct.

The question presented with respect to the gratuity offsets allowed is:

7. Whether the $175,000 disbursed by the United States under the Act of August 5, 1882, c. 390, 22 Stat. 257, 265,

is a gratuity offset under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596; or whether said payment was made as settlement in the nature of reparation to the Seminole Nation for errors made by the United States in moving the Seminoles on the wrong lands, and encouraging them to make valuable improvements thereon upon the promise that they would be protected if the boundary lines were found to be in error.

Statement—Case L-51

In its decision of May 11, 1942, 316 U. S. 286, 296-297, this Court laid down the underlying principle to be followed by the lower court in the disposition of this case, as follows:

> "• • • In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. • • •"

The case was remanded to the lower court for further proceedings with respect to Items II and V of the claim.

Item II involved a claim for $66,422.64, required by Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, to be paid annually per capita to the individual Seminole Indians, but which, instead, during the period 1870-1874, was paid over to the Seminole tribal officials at the request of the Seminole General Council (316 U. S. 286, 293-294).

Item V involved a claim for $864,702.58 of Seminole tribal income paid to the Seminole tribal officials during the period 1899-1907 (316 U. S. 286, 301).

With respect to said Items II and V this Court directed the lower court to make findings on the following issues:

(1) Whether the Seminole tribal officials were mulcting the Seminole Nation of its tribal income during the periods 1870-1874, and 1899-1907;

(2) Whether the appropriate Government officials, charged with the duty of administering Indian affairs and disbursing funds to the Seminoles, knew of said mulcting when the payments in question were made to said Seminole tribal officials; and,

(3) Whether the Seminole Nation received the benefit of any of said moneys thus turned over to said tribal officials (316 U. S. 286, 300, 308).

The lower court found that the Seminole tribal officials were not mulcting the Seminole Nation of its tribal income; that the officers of the United States had no knowledge of any mulcting by said Seminole tribal officials; and that the Seminole Nation received the benefit of said payments.

It is extremely difficult to understand these conclusions of the lower court in view of the facts disclosed by the record, some of which were reviewed by this Court in its decision of May 11, 1942 (316 U. S. 286). While pointing out that the facts outlined by it with respect to Item II may or may not establish the liability of the Government, this Court stated as follows (316 U. S. 286, 298-300):

> "• • • There are ample indications in the record before us that the Seminole General Council was mulcting the Nation and that the proper Government officials may well have had knowledge thereof at the time some, at least, of the payments were made. For about this time the Commissioner of Indian Affairs received several warnings from his subordinates that 'injustice to the majority' of the Seminoles existed, that the chiefs

> were in the habit 'of taking out what amount they chose' from the annuities, that the Seminoles were 'in bad hands,' and that the chiefs intended 'to "gobble" the next money for the purpose of keeping up their government.' And the Acting Commissioner of Indian Affairs was evidently aware, in 1872, of the possibility that the Council was faithless, for he declined to change the method of payment at the request of the Seminole Chiefs 'until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner proposed by the Chiefs.' "

This Court reviewed and quoted from the reports of Captain T. A. Baldwin, United States Indian Agent for the Seminoles, to the Commissioner of Indian Affairs; the report of John P. C. Shanks, Special Commissioner to the Commissioner of Indian Affairs, dated August 9, 1875; and the report of Special Agent Meacham to the Commissioner of Indian Affairs, dated November 20, 1878 (316 U. S. 286, 298-299).

The lower court has wholly disregarded this evidence, and the import of it, in arriving at the above conclusions. Even though the lower court has set forth the various reports of Agent Baldwin in the findings it endeavors to explain away their effect and to give them too narrow a construction. It has refused to consider the facts set forth in the Shanks and Meacham reports, which merely corroborate the facts disclosed in the earlier reports of Agent Baldwin. Only by disregarding all of the facts set forth in these reports of the Government's own agents could the lower court have arrived at its conclusions.

The same method was used in arriving at the lower court's conclusions with respect to Item V. The court picked out one isolated statement of the Dawes Commission, made in 1899 after the long fight to effect the change in conditions within the Governments of the Five Civilized Tribes osten-

sibly had been won, and having to do with tribal rolls only, and concluded from it that all of the earlier reports of the Dawes Commission did not intend to indict the Seminole tribal officials, or that the Dawes Commission did not know the facts existing with the Seminole Nation at the time these early reports were made (R. 56-7). An examination of these early reports of the Dawes Commission show clearly that it did intend to indict the Seminole Nation, and that it had a thorough knowledge of conditions existing within the Seminole Government at the time the reports were made. As this Court stated, when reviewing these reports and quoting from them (316 U. S. 286, 304):

> "* * * Shortly before the payments in question were made, the Commission to the Five Civilized Tribes pointedly described in its annual reports to the Secretary of the Interior and Congress the unbridled corruption of the various tribal governments, without singling out any particular government for unenviable distinction."

The lower court further disregards the reports made to Congress, the protests of the Seminoles, the reports of conditions existing within the Seminole Government made by the Government's own officers, the testimony of disinterested white men and the Seminole Indians, in arriving at its conclusions with respect to Item V.

Not only has the lower court failed to apply the principle of law laid down by this Court as the law of this case—that the conduct of the United States must be judged by the most exacting fiduciary standards—but it has also overlooked the principle that when a question arises between a trustee and a beneficiary, or between other parties who are in a fiduciary relation, as to the good faith of transactions between them, the burden is cast upon the one in whom the trust is reposed to show the fairness of the trans-

action. Jones' Commentaries on Evidence, 2nd Ed., Vol. 2, pp. 1009-1012; Pomeroy's Equity Jurisdiction, 5th Ed., Vol. 3, par. 956, p. 790; 20 Am. Jur., par. 141, p. 146; *Richardson's Executor* v. *Green,* 133 U. S. 30, 43; *McCandless* v. *Furland,* 296 U. S. 140, 165; *Pepper* v. *Litton,* 308 U. S. 295, 306-307.

In overlooking these principles the lower court has required petitioner, plaintiff below, to prove its case, not by a preponderance of the evidence, but beyond all reasonable doubt.

We submit that a proper application of the above principles to the facts disclosed by the record, upon which we will comment hereafter, would have led the lower court to the conclusion that petition was entitled to recover in this case.

Case L-208

The petitioner's quarrel with the lower court's decision in this case is confined solely to the question of value, and the rate of interest allowed by the lower court as a part of just compensation for the lands taken.

The petitioner submitted the testimony of eleven witnesses proving that the lands in question were reasonably worth $25.00 per acre during the period covered by the patents, 1892-1913. The respondent submitted the testimony of seven witnesses, three of whom testified that the lands were worth under $10.00 per acre in their unimproved state, and four witnesses testified that the average value of unimproved prairie lands was $10.00 per acre during the period covered by the patents (R. 113-115).

The lower court disregarded the testimony, having particular reference to the value of the lands involved, and took as a basis for fixing said values the prices for which certain Pottawatomie and Absentee Shawnee Indians sold their allotments under the Acts of August 15, 1894, c. 290,

28 Stat. 286, 295, and May 31, 1900, c. 598, 31 Stats. 221, 247. These acts authorized certain of these Indians over twenty-one years of age to convey land covered by their trust patents in excess of eighty acres, and nonresident Indians to sell all of their allotments, with the approval of the Secretary of the Interior. The Reports of the Commissioner of Indian Affairs show clearly that the considerations paid to Indians for their allotments did not reflect the true market values, as many of these sales were tainted with fraud. (H. Doc. 5, 54th Cong., 1st Sess., Cong. Ser. 3382, pp. 87-88; H. Doc. 5, 54th Cong., 2nd Sess., Cong. Ser. 3489, p. 90; H. Doc. 5, 55th Cong., 3rd Sess., Cong. Ser. 3757, p. 101; H. Doc. 5, 58th Cong., 2nd Sess., Cong. Ser. 4645, p. 280.) Furthermore these sales were made over the 30-mile wide Pottawatomie reservation, and were not shown to have any particular reference to the lands involved in this suit.

We believe that the lower court erred in using the prices Indians sold their lands for under said Acts of 1894 and 1900 as a basis for determining the average fair market value of the lands involved herein.

On the values of the lands so fixed the lower court allowed interest at the rate of 4 per centum per annum as the measure to make petitioner whole as of today for the taking which occurred during the period covered by the patents issued to said lands, 1892-1913. Clearly this was error, as the Seminole treaties and agreements show that five per centum per annum is a reasonable rate as between the parties (Treaty of March 21, 1866, 14 Stat. 755; Act of March 2, 1889, c. 412, 25 Stat. 980, 1004; Seminole Agreement, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567). See *United States* v. *Creek Nation*, 295 U. S. 103, 111-112, in which 5 per centum per annum was fixed as the proper rate in a similar case.

Gratuity Offsets

The petitioner further contends that the allowance of a gratuity offset in the amount of $175,000 paid by the United States under the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, was error, for this payment was made as reparation for an error made by the officers of the United States in moving the Seminoles on lands which turned out to be owned by the Creek Nation, and upon which the Seminoles had made valuable improvements upon the promises of said officers that they would be protected in their improvements, should the then boundary lines be in error. A settlement in the nature of reparation clearly would not be a gratuity offset under the provisions of the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

In the fall of 1866 the United States moved the Seminoles and located them on lands believed to be those purchased by the Seminole Nation in the Treaty of March 21, 1866, 14 Stat. 755. The boundary lines were not then established, but the Seminoles were promised that this would be done immediately. In 1868, one John Rankin surveyed the east boundary of the Seminole domain, and the Seminoles were shown this line, and those east were moved west of it. The Seminoles were told that this was their boundary line, and to go ahead and improve their lands, and if this line were found to be incorrect, the Seminoles would be protected in their improvements. The Rankin line was not approved. In 1871 one Frederic W. Bardwell surveyed said east boundary and located it approximately seven miles west of the Rankin line. This Bardwell line was approved in 1872. It thus developed that the Seminoles had erroneously been located on lands belonging to the Creek Nation, and that they had made valuable improvements on them. The officers of the United States negotiated with the Creek Nation for the cession of the area upon which the Seminoles had been settled, and in

1881 the Creek Nation ceded 175,000 acres to the United States for the use of the Seminoles. By Act of August 5, 1882, c. 390, 22 Stat. 257, 265, the amount of $175,000 was appropriated to pay the Creek Nation for the 175,000 acres thus ceded. By directing that this payment be made from public funds Congress intended that said payment be in the nature of reparation to the Seminoles for errors made by the officers of the United States in locating them upon the wrong lands and encouraging them to make thereon valuable improvements. This intent is clearly evidenced by the history of this legislation (R. 39-40, 70-71, 106-107; Sen. Ex. Doc. No. 75, 47th Cong. 1st Sess.).

Specification of Errors to Be Urged

The lower court erred:

As to Case L-51

1. In finding and holding that the Seminole Nation was not entitled to recover the amounts claimed in Items II and V under the views expressed in the decision of this Court, dated May 11, 1942, 316 U. S. 286.

2. In finding and holding that the Seminole tribal officers were not mulcting the Seminole tribal income turned over to them for disbursement by the officers of the United States during the periods 1870-1874 and 1899-1907.

3. In finding and holding that the officers of the United States charged with the duty of administering Indian Affairs and disbursing funds to the Seminole Nation did not know of said mulcting at the time said payments were made to said Seminole tribal officials.

4. In finding and holding that the Seminole Nation received the benefit of said tribal income thus turned over to said Seminole tribal officials.

5. In failing to find and hold that the action of the United States did not measure up to exacting fiduciary standards.

6. In failing to apply the well-settled principle that in a suit by a ward against its guardian, wherein it is alleged that the guardian was unfair in its dealings with the ward, the burden of proof is upon the fiduciary to show the fairness of the transaction.

As to Item II Particularly

7. In finding and holding that the respondent measured up to exacting fiduciary standards when it paid Seminole tribal income over to the Seminole tribal officials, well knowing that the Seminole tribal officials were appropriating said income to themselves by creating claims against the Seminole Nation and voting themselves salaries for sitting in councils which were of no benefit to the Nation, while the other members of the Seminole Nation (to whom the money belonged) were dying of exposure and want; and that said payments fulfilled the treaty obligation of the United States requiring this money to be paid per capita to the Seminole Indians.

8. In finding and holding that petitioner has not established from the facts found in Findings 1-5 (R. 15-24), that the Seminole tribal officials were mulcting the Seminole Nation of its tribal income; that when the officials of the United States having charge of Indian Affairs turned this Seminole income over to the Seminole tribal officials they knew of such mulcting; and that the Seminole Nation received no benefit from the disbursement of said money.

9. In failing to give proper consideration to the facts set forth in the various reports of Captain T. A. Baldwin, United States Indian Agent for the Seminoles during the period 1869-1870; and in giving said reports too narrow a construction.

10. In finding and holding that the Act of April 15, 1874, c. 97, 18 Stat. 29, and the circumstances leading to its passage, were material to the issues in this case, when the facts show that this Act did not become effective with respects to the Seminoles until April 2, 1879 (R. 95); that on October 3, 1874, the Seminole officials rejected said Act; and that on October 15, 1874, the Commissioner of Indian Affairs wrote the Seminole officials that the annuities were to be paid per capita as required by the Treaty of 1856 (R. 82-3); and the lower court further erred in failing to make findings of these material facts with respect to the Act of 1874.

11. In failing and refusing to make findings with respect to, and otherwise consider, the facts disclosing the intolerable conditions existing with the Seminole Government as set forth in the Reports of Special Commissioner John P. C. Shanks, dated August 9, 1875, and Special Agent A. B. Meacham, dated November 20, 1878, to the Commissioner of Indian Affairs, which were considered and quoted from by this Court in its decision of May 11, 1942 (316 U. S. 286, 299) as ample indications of the mulcting of the Seminole Nation by its tribal officers.

12. In failing to make findings of the material facts that the same Seminole tribal officials were in charge of Seminole affairs during the period 1870-1878, and that the names of these officials appear on the list of persons having claims against the Seminole Nation submitted by Agent Baldwin in April, 1870, and Special Commissioner Shanks, in 1875 (R. 83-5, 110, 117-119).

13. In failing to make a finding of the material fact that the amounts claimed by petitioner for the years 1871, 1872 and 1873, were suspended by respondent's own auditors, and were never allowed as proper disbursements against the

obligations of Article 8 of the Treaty of August 7, 1856 (R. 95-6).

As to Item V Particularly

14. In finding and holding that the respondent measured up to exacting fiduciary standards when it paid Seminole tribal moneys over to Andrew J. Brown, Seminole tribal treasurer, when it knew, or had ample means of knowing, that said Andrew J. Brown and his brother, John F. Brown, Principal Chief of the Seminole Nation, intelligent and shrewd businessmen, were keeping said tribal income, and were dealing at arm's length with the other members of the Seminole Nation, and requiring them to accept, in lieu of said tribal money due them, scrip, issued at a discount of 10 per cent, good for merchandise only at stores owned by the Brown brothers, where higher prices were charged; and when it is shown that a majority of these Seminole Indians had the mentality of a 12-year-old white child; and when it was shown that if the Seminoles needed cash they were required to discount the scrip to white men at 10 to 50 cents on the dollar.

15. In finding and holding that said Brown brothers, Principal Chief and Seminole tribal treasurer, were not mulcting the Seminole Nation of the tribal income due them from the United States, and in their arm's length dealings with these ignorant Seminole Indians.

16. In finding and holding that the respondent had no knowledge of these wrongs when it turned the Seminole tribal income over to said Brown brothers.

17. In finding and holding that the Seminole Nation received the benefit of all of said Seminole tribal income thus turned over to said Seminole tribal officials.

18. In failing to include in Finding 11 (R. 27) a finding of the material fact that the Browns were intelligent, shrewd

businessmen (R. 112). This is material to show the disparity between the parties.

19. In failing to find in Finding 12 (R. 28), and hold that the facts set forth in the reports of the Dawes Commission for the years 1894 and 1895, showing the intolerable conditions existing with the Governments of the Five Civilized Tribes applied also to the Seminole Nation, and that said facts were corroborated and confirmed in the later reports of this Commission for the years 1896, 1897 and 1898.

20. In failing to find and hold that the statement quoted from the annual report of the Dawes Commission for 1899 had reference to Seminole tribal rolls only.

21. In failing to find and hold that the Brown brothers were several of the Commissioners negotiating the Seminole Agreement, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567; and that by the terms of this agreement reserved to themselves the advantages acquired under an act of the Seminole Council, dated April 23, 1897, providing for the disposal of Wewoka townsite, under the terms of which the Browns were enabled to acquire this townsite property of the Seminole Nation for a small fraction of its value.

22. In finding without substantial evidence in support thereof, and contrary to the great weight of the evidence, and holding that (R. 30):

> "* * * Some Indians received all of their next head payment in chokasutka, others received a part, and others none at all.
>
> * * * * * * *
>
> "When the money for the head payments was received from agents of the United States, it was delivered to the treasurer, A. J. Brown, with the full knowledge of the members of the Nation. An accounting

was then made, and each Indian received credit for his head right. If he had used it up in scrip, he received no money; but if he had not withdrawn his allowance in whole or in part, he received the amount due him in cash. If he had not used all of the chokasutka issued to him, he could turn in the unearned coupons for cash or he could keep them and trade them out later."

23. In finding without substantial evidence in support thereof and contrary to the great weight of the evidence, and holding, that (R. 31):

> "* * * The average exchange price appears to have been about 50 cents on the dollar, in terms of cash, for chokasutka, and somewhat higher when chokasutka was received for goods."

24. In finding without substantial evidence in support thereof and contrary to the great weight of the evidence, and holding, that (R. 31):

> "It is not shown whether or not prices on goods at the Wewoka Trading Company were higher than the prices of similar goods at other stores."

25. In finding without substantial evidence in support thereof and contrary to the evidence adduced, and holding that upon the receipt of the report of Henry C. Lewis, an investigator for the Department of Justice, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the credit system used by the Browns be prohibited (R. 33).

26. In finding without substantial evidence in support thereof and contrary to the evidence adduced, and holding that (R. 34):

> "the proof does not show that the Browns misappropriated $191,294.20 of tribal funds, nor that they misappropriated any other sum."

27. In finding and holding without substantial evidence in support thereof and contrary to the evidence adduced that there is no proof in the record showing the truth of the statements of Congressman Flynn of Oklahoma Territory on the Floor of the United States House of Representatives in 1896 and 1897; the Seminole Protest of January 29, 1898; the Seminole Memorial to Congress of 1901; the reports of respondent's own officers in the Loyal Seminole payment matter—all indicating that the Browns, Seminole tribal officials during the years 1898 to 1907, were false to their trust, and that the Seminole Indians received little benefit from the Seminole moneys disbursed by the Browns during this period.

28. In limiting its findings and holdings to headright payments only, and in failing to designate the amount so disbursed; and in failing to find the amounts and the manner in which the other moneys going to make up the total amount claimed under Item V, were disbursed by said Seminole tribal officials.

As to Case L-208

29. In failing to find and hold that during the period 1892-1913, the average value of the Seminole lands involved, without improvements, was $25.00 per acre.

30. In finding and holding without substantial evidence in support thereof, and contrary to the great weight of the evidence adduced, that the value of said lands during said period was but $7.00 per acre.

31. In using as a basis for determining the value of the lands in question the small considerations paid to Indians for lands in sales tainted with fraud, instead of using as a basis for fixing values the prices paid by white persons for said lands on the open market.

32. In failing to make a finding of the material fact that the improvements on said Seminole lands were of little value

during the period 1892-1913, when the patents were issued thereto.

33. In finding and holding that interest at the rate of 4 per centum per annum on the value of said lands is the proper measure to use in determining the present full equivalent of said value if paid contemporaneously with the taking; and in failing to find and hold that 5 per centum per annum, which is the rate paid by the United States in the Seminole treaties and agreements, is the proper measure to determine the just compensation for the lands taken.

As to Gratuity Offsets

34. In holding that the $175,000 disbursed by respondent under the Act of August 5, 1882, c. 390, 22 Stat. 257,265, was a gratuity offset under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596; and that said payment was not reparation for an error made by respondent's officers in locating the Seminoles on the wrong land, and causing them to make improvements thereon, on the promise that they would be protected in their improvements, if it developed that their boundary lines were erroneously placed.

Reasons for Granting the Writ

The reasons for requesting this Court to review this case are set forth as follows:

1. On the retrial of Case L-51 under the mandate of this Court the lower court has failed to apply to the facts the underlying principle laid down by this Court as the law of this case—that in its dealings with its dependent Indian wards the conduct of the United States should be judged by the most exacting fiduciary standards (316 U. S. 286, 296-297).

2. The lower court has further failed and refused to give effect to the facts, reports, documents, etc., commented upon and quoted by this Court and made the basis for its decision of May 11, 1942 (316 U. S. 286), and has either endeavored to explain them away or draw erroneous conclusions therefrom.

3. The lower court has overlooked other material facts presented to it, and has found facts not supported by substantial evidence, and which were contrary to the great weight of the evidence produced.

4. The lower court has overlooked the well established principle that the fiduciary has the burden of proving the fairness of a transaction in a suit in which a transaction between the guardian and ward is questioned.

5. In Case L-208 the allowance of interest at the rate of 4 per centum per annum on the value of the lands as a part of just compensation for the lands taken, is not in accord with the holding of this Court in *United States* v. *Creek Nation*, 295 U. S. 103, 112, a similar case, in which this Court fixed 5 per centum per annum as the proper rate.

Furthermore, in fixing the values of the lands involved in this case the lower court discarded the testimony of the witnesses with respect to values of these particular lands, and determined values on the basis of sales of Indian allotments tainted with fraud, which had no particular bearing on the value of the lands in question, and which would not reflect the fair and reasonable market values.

6. In allowing a gratuity offset of $175,000, paid under the provisions of the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, the lower court has overlooked the history of this transaction, and the intent of Congress in the light of this history in making provision for this payment, which show clearly that this payment was a settlement by way

of reparation for errors made by officers of the United States in moving the Seminoles on the wrong lands and causing them to make valuable improvements thereon; and therefore, said amount would not be a gratuity offset under the provisions of the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

Case L-51

In its decision of May 11, 1942, this Court stated (316 U. S. 286, 296-297):

> "* * * In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. * * *"

Thus this Court established the law of this case, and remanded it to the lower court with specific instructions for it to find the facts with respect to the issues outlined in the decision.

In its decision of December 4, 1944, on these issues the lower court has failed to apply the above quoted principle to the facts proven in this case.

Furthermore, the lower court has failed to apply the well-settled principle that in this case the fiduciary has the burden of proof to show the fairness of the transactions in question. In Jones Commentaries on Evidence (2 Ed.), Vol. 2, Sec. 549, p. 1009, the rule is aptly stated as follows:

> "The rule is that the burden of proof is always upon the party alleging a fraud; but there is one large class of cases which form an apparent exception. When a question arises between a trustee and a beneficiary,

> or between other parties who are in a fiduciary relation, as to the good faith of transactions between them, a peculiar burden is imposed upon the one in whom the trust is reposed. When the complaining party proves such relation, the burden is cast upon the trustee or other person holding the relation of trust to show that the transaction is fair and reasonable and that all proper information was given to the other party. To state the rule more broadly, when confidential relations exist between two persons, resulting in one having an influence over the other, and a business transaction takes place between them, resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction, and casts the burden of evidence upon the person benefited to show that the confidential relation was, as to that transaction at least, suspended and that it was as fairly conducted as if between strangers."

See also Pomeroy's Equity Juris., 5th Ed., Vol. 3, Par. 956, p. 790; 20 Am. Jur., par. 141, p. 146; *Richardson's Executor* v. *Green*, 133 U. S. 30, 43; *McCandless* v. *Furland*, 296 U. S. 140, 165; *Pepper* v. *Litton*, 308 U. S. 295, 306-307.

The lower court has reversed this rule and has thrown the burden on the ward, and required the ward to prove beyond the shadow of a doubt that the transactions herein involved were unfair.

Notwithstanding the above-quoted principle petitioner believes that the great preponderance of the evidence shows that the Seminole Nation is entitled to recover on Items II and V.

Before discussing the evidence let us point out that the lower court evidenced no disposition to follow the decision of this Court, for it has undertaken to review the question of jurisdiction which was passed upon and finally settled by this Court (R. 46). On this question this Court stated (316 U. S. 286, 297-298):

> "• • • Although the Court of Claims had jurisdiction of this issue, for such an action for breach of fiduciary duty growing out of treaty obligations is clearly an equitable claim within the meaning of the jurisdictional act, 43 Stat. 133, the court did not consider, and hence made no findings on this issue."

Thus this Court pointed out that the lower court had jurisdiction, and further referred to the Act of August 16, 1937, c. 651, 50 Stat. 650 (quoted supra, p. 3), directing that this case be reinstated and retried on its merits (316 U. S. 286, 297). We believe that this Court has finally settled this question.

Item II

The lower court denied recovery for the amounts turned over by the officers of the United States to the Seminole tribal officials, in violation of Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, because it held that said tribal officials were not mulcting the tribe of the tribal income; that the officers of the United States did not know of any such mulcting when the tribal moneys were thus turned over to said tribal officials; and that the Seminole Nation received the benefit of said tribal moneys.

In arriving at these conclusions the lower court has overlooked the plain facts submitted in the reports of three of the Government's own agents, made during or soon after the period of the claim. These reports were made by Captain T. A. Baldwin, United States Indian Agent for the Seminoles, to the Commissioner of Indian Affairs, during the years 1869-1870; by Special Commissioner John P. C. Shanks, to the Commissioner of Indian Affairs on August 9, 1875; and by Special Agent A. B. Meacham, to the Commissioner of Indian Affairs on November 20, 1878 (R. 17-20; 83-86).

This Court commented upon some of these reports and quoted from them as ample indications of the mulcting of

the Seminole tribal income by the Seminole tribal officials (316 U. S. 286, 298-299). The lower court, on the facts set forth in these reports, arrives at an entirely different conclusion from this Court, either by attempting to explain away the effect of them, or by refusing to consider them at all.

With respect to the various reports of Captain T. A. Baldwin, United States Indian Agent for the Seminoles, the lower court concludes (R. 52):

> "The substance of all of Captain Baldwin's recommendations is that, while he believed some of the annuity payments should have been paid for the support of the government of the tribe, he thought too much of them had been devoted to that purpose."

We believe that the lower court has placed too narrow an interpretation on the facts set forth in the Baldwin reports.

The Treaty of August 7, 1856, 11 Stat. 699, specifically provided that this Seminole tribal income be paid per capita directly to the individual members of the Seminole Nation. Article 8 of said Treaty states in part as follows:

> "* * * the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws."

The Baldwin reports show beyond question that this treaty provision was violated, and that the Seminole officials were themselves acquiring over one-half of all of this Seminole tribal income, while the individual Seminole Indians, to whom this money actually belonged, received a small pittance of the amounts due them.

The Baldwin report of December 6, 1869 (R. 18-19) clearly shows that the Seminole officials were creating claims in favor of themselves for sitting in councils which were of no benefit to the Nation, and securing payment of these claims for their salaries in doing so out of the moneys required by the treaty to be paid per capita. Baldwin states that the Seminole chiefs created a large debt against the Nation for signing the Treaty of March 21, 1866 (see II Kappler 915). Said treaty does not call for such a payment, and there was no obligation on the part of the Seminole Nation to pay it. Nevertheless, the chiefs had taken out $9,000.00 from the tribal income and pocketed it to pay themselves for this spurious claim, and a balance of $9,000.00 was due at the time Baldwin made his report (R. 18). This amount paid these chiefs evidently was taken out of moneys required by the Treaty of 1856 to be paid per capita, as this was practically all the income the Seminole Nation had at this time. Commenting upon such payments Baldwin states (R. 18-19):

> "I would state that they are in the habit of calling Councils, for any little thing that may arise and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation, except in spending the funds; which are taken out of those ordered paid per 'capita' to the nation.
>
> "I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making returns to the department, upon rolls as if it had been paid per 'capita.'
>
> "I think that it is an injustice to the majority of the people comprising this nation and the only way to avoid unnecessary expenditure of money for Councils, etc., which are of but little benefit to the nation (for example the last council held cost the nation $700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what

amount shall be turned over to the Chiefs and the balance paid to heads of families in person."

At the time the Seminole Officials were gobbling up most of the tribal income, the Seminoles themselves—to whom this money actually belonged—were without shoes and other articles of wearing apparel, and were dying of pneumonia for want of these things (Baldwin report, dated January 12, 1870, R. 19).

All of these facts were known to the United States before the payment of April, 1870, was made. The schedule of this payment shows that $17,821.00 went to the Seminole officials out of a total of $25,000.00 due the tribe, and $7,179.25 only was paid per capita to the Seminoles in accordance with the Treaty of 1856 (R. 17).

Agent Baldwin continues to call the attention of the Commissioner of Indian Affairs to the wrongs being done the Seminole Nation, and continues to refer to the April, 1870, payment as an example of these wrongs. On June 30, 1870, he pointed out that the chiefs received the bulk of the annuities while the people received but a pittance due them. He recommended that the money be paid per capita, as provided by Treaty (R. 19). Again Agent Baldwin, on September 1, 1870, recommended that the Treaty of 1856 be rigidly enforced as the chiefs had been in the habit of taking out what they chose, allowing the balance to be paid per capita. "This is an injustice, as few receive the bulk of their annuities" (R. 20).

Baldwin's recommendations were to the effect that the Seminole money be paid per capita in accordance with the Treaty of 1856. It is true, as the lower court points out (R. 17-18), that in his first request of November 3, 1869, he stated that all of the next annuities due should be paid to the chiefs for the support of the Seminole government, as the amount appropriated for that purpose was not ade-

quate. But in his report of December 6, 1869, Baldwin qualified his former recommendation, and asked the Commissioner of Indian Affairs to designate the amount to be turned over to the chiefs for salaries (R. 18-19). In order to guide the Commissioner in making his instructions, Agent Baldwin thereafter set forth the facts existing within the Seminole government (R. 18-19). Thus he informed the Commissioner of these intolerable conditions, and showed clearly how the Seminole officials were mulcting the Seminole Nation of its income. While leaving the ultimate decision to the Commissioner, Agent Baldwin endeavored to inform the Commissioner that, under the circumstances outlined in his report, none of these Seminole moneys should be turned over to the Seminole officials for disbursement.

Let us emphasize the fact that in all of his reports, made subsequent to 1869, Agent Baldwin strongly recommends against paying any of this Seminole tribal income over to the Seminole officials, and further recommends that the money be paid per capita, strictly in accordance with the provisions of the Treaty of 1856.

It is thus evident that the lower court has placed too narrow a construction on the Baldwin reports, and its conclusion disregards the many recommendations of Baldwin—that this money be paid per capita in strict accordance with the treaty, to insure the individual Seminole Indian receiving his just share of the tribal income.

Agent Breiner succeeded Baldwin, and his reports confirm those of Baldwin. Agent Breiner's reports show that the Seminoles were not capable of handling their own affairs (R. 22-23), and that the threat of the Seminole officials to appoint collectors to receive the money as it was paid per capita induced him to turn it over to the Chiefs (R. 24-25). Furthermore, twice the Interior Department rejected requests of the Seminole officials, submitted by Agent Breiner,

to have this money turned over to them for disbursement (R. 22, 82; 316 U. S. 286, 300). Breiner, nevertheless, made these payments to the Seminole officials, and the payments were suspended and never allowed by defendant's own auditors as proper disbursements against this treaty obligation (R. 95-96). Thus, no facts are reported during this period to refute the facts stated by Baldwin, and Breiner's reports tend to confirm them.

We believe that the lower court attached too much importance to the Act of April 15, 1874, c. 97, 18 Stat. 29, and the facts surrounding its passage, for the following reasons:

1. The act was not an outright grant of these Seminole moneys to the Seminole officials, but provided that the Secretary of the Interior could disburse these funds, or in the alternative, could turn them over to the tribal officials for disbursement.

2. That the letters recommending its passage recognize the danger of turning this tribal money unqualifiedly over to the tribal officials for disbursement.

3. That the act was rejected by the Seminole officials soon after its passage, and it did not become effective until 1879.

The lower court said (R. 55):

> "We cannot believe any such authority would have been granted by Congress if it had reason to believe the Council was corrupt, venal, and false to its trust."

Evidently the lower court overlooked the fact that the Act of April 15, 1874, authorizing a change in the manner of disbursing this Seminole annuity, was not an absolute grant of authority to the Seminole officials to disburse this money, but it was made discretionary with the Secretary of the Interior whether this money be turned over to the tribal officials.

In the letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated January 9, 1874, the Commissioner pointed out that (R. 25):

> "There is danger, however, if these funds are placed entirely in the control of those who may for the time be in authority, that the nation will not always receive its just benefit under the terms of the treaty.
>
> "To prevent this possible evil, as well as the evil of per capita payment, I respectfully invite the attention of the Hon. Secretary to the expediency of requesting from Congress authority to expend this Seminole fund, under direction of the Secretary of the Interior, for their national and other beneficial purposes. With this discretionary power lodged in the Department, such control can be held over the expenditures by national authorities of the Seminoles as will be likely to insure an economical and beneficial use of the nation's funds."

And in the letter of the Secretary of the Interior to the Speaker of the House of Representatives, dated January 9, 1874, the Secretary pointed out (R. 26):

> "* * * The payment of cash to individual Indians has, according to all the experience furnished by the Indian Office, tended to produce debauchery and demoralization, rather than to advance the civilization or improvement of Indian tribes."

The debauchery and demoralization connected with per capita payments to the Seminoles was caused by the efforts of the Chiefs and those associated with them to get hold of this annuity money belonging to the individual members of the Seminole Nation, as was clearly pointed out in the reports of Agent Baldwin.

Thus the effect of the reports of Agent Baldwin were recognized throughout, and the above statements confirm rather than refute his reports of conditions existing with the Seminole Nation.

Furthermore, the Act of 1874 was rejected by the Seminole officials on October 3, 1874 (R. 82), and the Commissioner of Indian Affairs notified the Seminole officials that the moneys would thereafter be disbursed per capita, in strict accordance with the Treaty of 1856 (R. 83). It was not until the year 1879 that this act became effective (R. 95), and this was five years beyond the period of our claim.

Therefore, it is evident insofar as our claim is concerned, the Act of 1874 is wholly immaterial to the issues herein involved, and should not have been considered in the determination of this case by the lower court.

The lower court has disregarded the report of Special Commissioner John P. C. Shanks, to the Commissioner of Indian Affairs, dated August 9, 1875, and the report of Special Agent Meacham to the Commissioner of Indian Affairs, dated November 20, 1878 (R. 83-86), because these reports were not "before the Commissioner when he authorized the payments in question" (R. 55).

We believe that the lower court erred in this respect for the following reasons:

1. These reports confirm the earlier reports of Agent Baldwin, and we submit that the lower court cannot properly ignore the facts clearly set forth therein, and showing the intolerable conditions existing within the Seminole government at this time, especially when they were commented upon and quoted in this Court's decision as ample indications of the mulcting of the Seminole Nation by the Seminole tribal officials (316 U. S. 286, 299).

2. While these reports cannot well be used as evidence of knowledge on the part of respondent before the payments in question were made to the Seminole tribal officials, they may properly be referred to and used to corroborate the earlier reports of Agent Baldwin, and to show the true

conditions existing within the Seminole government during the period 1870-1878, which includes the period of our claim, as the same Seminole officials were in charge of Seminole affairs throughout this whole period (R. 83, 85, 110, 117-119).

The Shanks and Meacham reports corroborate the earlier reports of Agent Baldwin, and show clearly that the facts set forth by Baldwin in 1869 and 1870 were true, not only during the period 1870-1874, the period of our claim, but continued unrestrained throughout the year 1878. The mere fact that Shanks might have desired to become attorney for the Seminole Nation, certainly would be no justification for a holding that the facts submitted in his report were untrue (R. 55), especially in view of the fact that Meacham, three years later, reported practically the same conditions existing with the Seminole Nation.

The lower Court states as follows (R. 54):

> "We do not think it can be concluded from this that the Commissioner of Indian Affairs had knowledge of the fact that the General Council was corrupt, venal, and false to its trust. He had reason to believe that the chiefs and lawmakers put too high a value on their services to the nation, that they wanted their own services paid for, even if the other members of the nation needed the money more than they did, and that they were overanxious to render services and run up bills against the nation. Such charges are not infrequently leveled at the law-making bodies and public officials of the white man; but they do not amount to charges of corruption, venality, and fraudulent breach of trust."

In its decision of May 11, 1942 (316 U. S. 286, 296) this Court reached a directly opposite conclusion, and stated:

> "* * * The Seminole General Council, requesting the annuities originally intended for the benefit of the

individual members of the tribe, stood in a fiduciary capacity to them. Consequently, the payments at the request of the Council did not discharge the treaty obligation if the Government, * * * officials administering Indian affairs and disbursing Indian moneys, actually knew that the Council was defrauding the members of the Seminole Nation.

* * * * * * *

"* * * There are ample indications in the record before us that the Seminole General Council was mulcting the Nation and that the proper Government officials may well have had knowledge thereof at the time some, at least, of the payments were made. * * *"

The lower court's conclusion would be exactly right if all of these Seminole moneys belonged solely to the tribal officials, and no fiduciary relationship had existed between the parties. However, this is not so. The Treaty of 1856 required this Seminole income to be disbursed equally among all the members of the Seminole tribe, and this money did not belong solely to the tribal officials. As this Court pointed out, the Seminole tribal officials were merely trustees for the other members of the Seminole Nation in the receipt of the money.

Clearly the conduct of these Seminole tribal officers did not measure up to exacting fiduciary standards when they appropriated over one-half of the Seminole tribal income to themselves by creating large claims against the Nation for sitting in councils which were of no benefit to the Nation, and voting themselves salaries for doing so, while the majority of the Seminole Indians—to whom the money rightfully belonged—were dying of starvation and for want of adequate clothing.

Nor did the respondent's conduct measure up to exacting fiduciary standards when it paid these Seminole tribal moneys over to the Seminole officials after the receipt of the

Baldwin reports, informing it of the intolerable conditions existing within the Government of the Seminole Nation.

We submit that the payment of the Seminole tribal money to the Seminole tribal officials, under the circumstances outlined above, did not fulfill respondent's obligation under the Treaty of 1856, requiring this money to be paid per capita directly to the individual members of the Seminole Nation; that the Seminole Nation received no benefit from said payments; and that petitioner was entitled to recover the amount claimed during the period 1870-1874, under the views expressed in the decision of this Court.

Item V

The lower court had denied petitioner recovery for the amounts claimed for the period 1898-1907, during which the affairs of the Seminole Nation were dominated and controlled by two half-breed Seminole Indians: A. J. Brown, Seminole Treasurer, and his brother, John F. Brown, Principal Chief, shrewd business men. These Seminole officials were dealing at arm's length with ignorant full blood Seminole Indians—having the mentality of a 12-year-old white child—and were acquiring the bulk of the Seminole income by issuing scrip to these Indians in lieu of the money due them, and requiring them to take it at a discount of 10 per cent. This scrip was good for merchandise only at Brown Brothers' stores, where merchandise was sold at high prices.

In order to get cash the Seminoles were forced to sell this scrip to white men for 10 to 50 cents on the dollar, the average cash price being about 25 cents on the dollar. If the scrip were traded out in merchandise at other stores the usual rate was 50 cents on the dollar of scrip.

In the manner above described the Browns became rich, and were able to acquire most of the Seminole tribal income for themselves. When the tribal moneys were deposited

with the Assistant Treasurer of the United States at St. Louis, Mo., to the credit of the Seminole Treasurer, A. J. Brown and John F. Brown were thus enabled to rake it all over into the tills of the Wewoka Trading Company and another store owned by them.

This was common knowledge, and was publicly aired on the floor of the House of Representatives in 1896 and 1897, by Congressman Flynn of Oklahoma Territory, before the United States paid these Seminole moneys over to the Browns for disbursement (28 Cong. Rec. 2070; 29 Cong. Rec. 1261).

In denying recovery to petitioner we believe that the lower court has overlooked much of the documentary evidence, and the testimony of witnesses filed in the record, and has otherwise erred in the various respects hereinafter pointed out and discussed below.

Furthermore, the lower court has failed to apply the law governing this case, as laid down by this court, that the conduct of the United States in dealing with its Indian wards must be judged by the most exacting fiduciary standards (316 U. S. 286, 297); and the well established principle that in this case the burden of proof is upon the fiduciary to show the fairness of these transactions (see *supra*, n. 22).

In arriving at its conclusion the lower court has disregarded many of the reports of respondent's own officers, made at a time when nothing was at stake, and has required its ward to prove beyond the shadow of a doubt that the transactions of the Browns with these backward Seminole Indians were unfair.

The lower court first endeavors to explain away the early reports of the Dawes Commission setting forth the intolerable conditions existing within the Governments of the Five Civilized Tribes generally. The facts were not confined to the Dawes Commission reports of 1894 and 1895, but were

reiterated and confirmed in their later reports of 1896, 1897, and 1898.

To support its view the lower court quotes an isolated statement contained in the 1899 Report of the Dawes Commission, made after the long fight to correct conditions ostensibly had been won, and the Seminole Agreement had been executed, and which statement appears under the general heading "Enrollment of Citizens" (1899 Rept. Dawes Comm., H. Doc. No. 5, 56th Cong., 1st Sess., p. CXVI, Cong. Ser. 3914), under the subhead "Seminoles", in a paragraph dealing with the Seminole tribal rolls (Ibid., pp. CXVIII-CXIX). The topic sentence of the paragraph reads as follows:

> "The Seminoles, as has already been seen, are the fewest in numbers of the Five Tribes, and their government has been free from corruption."

The paragraph then outlines the work done on the tribal rolls. From the context of the paragraph it will readily be seen that this statement had reference to the tribal rolls and to nothing else.

With respect to the above statement the lower court concludes (R. 57):

> "* * * It would appear, however, that the Commission either did not mean to include the Seminoles in the indictment or that at the time it was unacquainted with conditions in this tribe, * * *"

The facts do not bear out the lower court's assumption. A mere reference to the Report of the Dawes Commission, dated November 20, 1894 (H. Ex. Doc. No. 1, Pt. 5, 53 Cong., 3 Sess., pp. LXIV-LXV, Cong. Ser. 3305), shows that the Dawes Commission visited the Seminole Nation on April 6, 1894, and addressed the Seminole Council; that the Council passed resolutions refusing to negotiate with the Dawes

Commission; and that on July 26, 1894, the Dawes Commission submitted certain propositions to the Seminoles as a basis for negotiations, together with a letter addressed to John F. Brown, Principal Chief, Seminole Nation, Wewoka, Ind. T., dated July 28, 1894, which stated in part as follows:

> "We hope to be informed in regard to the action of your nation prior to the 1st of October next. If your nation should decline to appoint a commission as requested, we desire at that time to submit a report to the Secretary of the Interior of the condition of the Seminole people and the causes and influences obstructing the policy of the U. S. Government in regard to a change of land tenure and government, with such other facts as may seem pertinent and will enable the Government to take such further action as it may deem wise.
>
> "Information, alike accessible to all, must convince you of the earnest desire of the United States to effect a change in the condition of the Five Civilized Tribes, and of the many advantages which would accrue to your people if they shall effect such change by agreement."

The Dawes Commission received no reply to the above letter (Ibid., p. LXV), and then follows the report of the intolerable conditions existing within the governments of the Five Civilized Tribes, including that part which is quoted in this Court's opinion (316 U. S. 286, 304-305), as follows:

> "Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such

laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available."

It is thus plainly evident that the Dawes Commission intended to include the Seminole Nation in the indictment, and that the Commission was well acquainted with conditions existing within the government of the Seminole Nation. In fact, this report shows that the Commission had an intimate knowledge of conditions as they existed within the Seminole Nation at the time this report was made. The facts reported were confirmed by later reports of the Commission, and by incidents hereinafter referred to affecting in particular the Seminole Nation.

The report of the Dawes Commission, dated November 18, 1895 (H. Doc., vol. 14, Doc. 5, 54th Cong., 1st Sess., pp. LXXX-LXXXIII, Cong. Ser. 3381), shows that it received no replies to letters sent to John F. Brown, Principal Chief of the Seminole Nation. In this report the Commission states in part (Ibid., pp. LXXXVII, XCIII):

"In connection with the official intercourse here briefly outlined the Commission availed themselves of every opportunity of conference with private citizens of the several nations, men of character and influence among their people. By visits to the various localities they familiarized themselves with the conditions of life and the opinions and prejudices which prevail in the different sections, and adapted the methods of their attempt at negotiation to these conditions. But thus far they have met with no favorable response among those holding power and controlling the political machinery in the governments now existing in the Territory. * * *"

* * * * * * *

"A greater familiarity with the condition of affairs in the Territory than the Commission had at the time

of making their last report does not enable it to abate anything of its representation of the deplorable state of affairs as therein stated. They are not only compelled to reaffirm all that they reported of the utter perversion of justice by those who have gotten possession of the machinery and funds of its administration, this Territory, inflicting in its name and that of the lawmaking power irreparable wrongs and outrages upon a helpless people for their own gain, but they are compelled to report that statistics and incontrovertible evidence shows a much more deplorable and intolerable state of affairs than was there represented. * * *"

After reviewing more facts in support of these statements, the Dawes Commission concludes with the statement quoted in this Court's opinion (316 U. S. 286, 305), as follows:

> "The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

Thus, it is evident that the Dawes Commission meant to include the Seminole Nation in its indictment, and knew conditions existing within the Seminole Nation at the time its 1895 report was made.

In its report, dated November 28, 1896, the Dawes Commission reported some progress in its work, and further stated as follows (H. Doc. Vol. 12, Doc. 5, 54th Cong., 2d Sess., p. CLIV, Cong. Ser. 3488):

> "Each of the other tribes, except the Seminoles, have recently enacted laws authorizing the appointment of commissions to confer with this Commission. Some of these commissions were clothed with authority to

> negotiate and then report to their councils the result, while others were only authorized to confer, and then after report await further action of their council. * * *"

Thus it is shown that the Seminole Council, then controlled by the Browns, opposed the change proposed by the Dawes Commission.

In its report of October 11, 1897, after referring to agreements made with the Choctaws and Chickasaws, and the Creeks, the Dawes Commission stated in part as follows (H. Doc., vol. 12, Doc. 5, 55th Cong., 2d Sess., p. CXIX, Cong. Ser. 3640):

> "* * * The first source of opposition arises from the fact that power in the Indian legislative councils and courts has passed into the hands of a few of the more intelligent, able, and grasping of their people, who use that power, by legislation upheld by their courts, to appropriate to their own exclusive use nearly all their tribal property of any value. The methods resorted to to effect this spoliation of the less intelligent and feeble main body of their people have been so fully set forth in former reports that it is not deemed necessary to repeat them here. * * *"

We have carefully reviewed these earlier reports to show that the lower court is in error when it concluded that the statement from the Dawes Commission report of September 1, 1899, having to do with tribal rolls only, refuted all of these earlier reports of the Commission. These early reports did intend to indict the Seminole tribal government, then controlled by the Browns, along with the other governments of the Five Civilized Tribes; and it is evident that the Dawes Commission had personal knowledge of the intolerable conditions existing with the Seminole Government at the time these reports were made.

In view of the facts reviewed above it is difficult to follow the lower court's reasoning that (R. 58):

> "Thus it appears that the reports of this Commission, instead of proving that the General Council was corrupt, testify of its fidelity to its trust."

We submit that the facts outlined above prove definitely that the lower court's conclusion to be correct should be just the reverse.

As this Court stated in its decision of May 11, 1942 (316 U. S. 286, 304):

> "* * * Shortly before the payments in question were made, the Commission to the Five Civilized Tribes pointedly described in its annual reports to the Secretary of the Interior and Congress the unbridled corruption of the various tribal governments, without singling out any particular government for unenviable distinction."

There are many incidents in the record to substantiate the facts report by the Dawes Commission and having particular reference to the Seminole tribal government and the conduct of the Brown brothers, which show conclusively that the facts reported by the Dawes Commission were true with respect to the Seminole Nation. We list these incidents as follows and comment upon them, and the conclusions of the lower court with respect to each incident:

1. The 1889 steal of the Brown brothers;

2. The advantages acquired by the Brown brothers over the other members of the Seminole Nation under the terms of the Seminole Agreement, and their illegal acquisition of Wewoka townsite;

3. The Loyal Seminole payment matter in which the Browns acquired a large amount of money at the expense of certain of the other members of the Seminole Nation;

4. The arms length dealings of the Brown brothers with their ignorant Seminole brothers, by which the Browns acquired the Seminole income, and grew rich at the expense the other members of the Seminole Nation;

5. The Browns' use of force and duress upon these ignorant Seminole people in order to collect their merchandise accounts, and to acquire their individual annuity checks after the United States officers distributed their moneys to them individually;

6. The facts leading to the request of the Interior Department for the resignation of the Browns.

All of these incidents are substantiated by the reports of the Government's own officers, investigating complaints of the Seminole Indians.

The Browns were long identified with Seminole affairs, and their connection with Seminole affairs covers both periods of our claim. During the period 1870-1874 John F. Brown appears to have been clerk of the General Council, National Secretary, and Treasurer of the Seminole Nation (R. 110, 119-122). His name appears upon the April, 1870, list of Seminole tribal officials claiming for services purportedly rendered the tribe, submitted by Agent Baldwin (R. 119). His name also appears on the list of Seminole officers claiming tribal moneys for services purportedly rendered the tribe, which was greatly condemned by Special Commissioner John P. C. Shanks in 1875 (R. 110). In the period 1898-1907 the Brown brothers completely dominated and controlled Seminole affairs.

The 1889 Steal of the Brown Brothers

In 1889 John F. Brown was Principal Chief, and Andrew J. Brown, his brother, was Treasurer of the Seminole Nation. Between them they had complete control of the tribal council and the affairs of the Seminole Nation. Armed with authority from the Seminole Council they collected $191,294.20 from the Treasury of the United States in Washington, which was part of the consideration due the Seminole Nation under an Agreement, ratified by Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, and the money vanished from sight and never reached the Seminoles.

The lower court found, and its decision holds (R. 34, 58), that the proof does not show that the Browns misappropriated this money. The lower court has overlooked the investigation of this whole transaction made by the Interior Department. In his report of August 24, 1889, to the Commissioner of Indian Affairs, United States Special Agent, Robert S. Gardner, stated that this transaction "savors somewhat of fraud" (R. 96-99).

About the same time the Seminole officials ostensibly paid the $191,294.20 of Seminole tribal moneys to Samuel J. Crawford for legal services purportedly rendered the Seminole Nation, certain Creek officials also paid $228,058.71 of Creek funds to Crawford for similar services purportedly rendered the Creek Nation. In his letter of February 11, 1889, commenting on the Creek matter, the Secretary of the Interior wrote the Chairman of the House Committee on Indian Affairs in part as follows (*Creek Nation* v. *United States*, 93 C. Cls. 1, 6):

> "* * * The recent agreement of cession was made by me without the intervention of any attorney, but directly; and I have not been cognizant of the extent or value of any services which have been rendered by Mr. Crawford in the past upon the request of the pres-

> ent delegates, or of any former delegates, of that Nation. * * *"

It is thus evident that Crawford furnished no services in these matters, and the arrangement with Crawford was merely a subterfuge to cover up the theft of this Seminole tribal income.

The protests of the Seminoles themselves set forth this transaction (R. 34, 99). But the lower court finds and holds that these protests are not substantiated by any proof in the record (R. 35-36, 58-59). Clearly these Seminole protests are justified and substantiated by the reports of the respondent's own officers.

It is not difficult to understand why the Dawes Commission reported against such conditions existing within the Governments of the Five Civilized Tribes during the period 1894-1898.

The Brown's Illegal Asquisition of Wewoka Townsite

Because of their official positions and their absolute control over Seminole tribal affairs, the Browns were selected as several of the commissioners to represent the Seminole Nation in negotiations with the Dawes Commission. In this position they so influenced the terms of the Seminole Agreement as to secure to themselves advantages not enjoyed by the other members of the Seminole Nation, and which were detrimental to the interests of the Seminole Nation as a whole (R. 99-100).

Under the terms of the Seminole Agreement, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, the Browns freed themselves of the restraints on acts of council imposed by the Act of June 7, 1897, c. 3, 30 Stat. 62, 84; thus acquiring a free rein to exercise their domination and control over the Seminole Council and the affairs of the tribe in general.

Also under the terms of this agreement the Browns were able to perpetuate the benefits they acquired under the Act of the Seminole Council, dated April 23, 1897, providing for the disposal of Wewoka townsite owned by the Seminole Nation. The Seminole Agreement provided in part as follows (30 Stat. 567, 568):

> "The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the General Council of the Seminole Nation, approved April 23d, 1897, relative thereto;"

Under said townsite act A. J. Brown had acquired one-fourth of this townsite property, or 1,102 lots (*Seminole Nation* v. *United States*, 92 C. Cls. 210, 212). And on February 12, 1900, the remaining lots were sold by the townsite commission, of which A. J. Brown was Secretary, en bloc to John F. Brown, Principal Chief of the Seminole Nation, for $12,000.00. The sale was approved by the Seminole tribal council on April 18, 1900. The consideration was paid to the Seminoles by the issuance of $11,200.00 in merchandise scrip good only at Browns' stores (R. 101-103). Thus the Browns acquired this Wewoka townsite property themselves, valued at approximately $400,000, for a small fraction of its value, and for this meager consideration to the Seminole Nation (92 C. Cls. 210, 212-214).

It is evident that the Browns engineered the tribal Act of 1897 through the Seminole Council, and so dictated its terms that the townlots could not be sold except to Seminole citizens. As Acting Commissioner of Indian Affairs Tonner stated in his letter of February 24, 1904, to the Secretary of the Interior (R. 103-104):

> "By limiting the sale of lots in the town of Wewoka to citizens of the Seminole Nation, the National Council rendered it impossible that any adequate consideration be realized by the nation, for the townsite, prior to the

expiration of the Seminole government March 4, 1906. However, the language of this law is: 'Provided, that no sale shall be made to non-citizens, whether Indians by blood or otherwise, until the tribal organization as such shall cease to exist.' This limitation was not, as will be realized at once, intended to be permanent. The Seminoles were not capitalists or investors, and that was well known at the time this law of April 23, 1897, was passed. There was no reason for delusion as to the amount of business that would be done with Seminoles prior to the expiration of the tribal government. The townsite commission understood this as well as anybody could. That only seven lots had been sold, amounting to $600, in three years, should have caused no surprise. No other result could have been expected.

"The saving clause was the provision of the Seminole agreement of July 1, 1898, that ended the limitation when the government ceased to exist, and vested in the Secretary of the Interior authority to sell the remaining lots to any who might wish to buy. It was not intended that the lack of capital or enterprise among the Seminole people should create an opportunity for influential citizens of the nation to take advantage of the conditions, to betray their trust, and speculate on them. Under the authority vested in the Interior Department, it would have been possible to sell the unsold lots after March 4, 1906, at a good figure—realizing several times the amount paid by Brown if sold according to the method pursued in the other nations in Indian Territory. * * *

* * * * * * *

"The Department is faced in this matter by the unusual condition that all the authorities of the Seminole Nation appear to be in sympathy with the Browns and the other persons who dealt with them in this matter, and there is no official complaint for the Department to take action on. * * *"

The Seminoles protested against this sale to the Browns, and the facts were submitted to the Assistant Attorney General for the Interior Department for decision. On March 19, 1904, Assistant Attorney General Frank Campbell rendered an opinion holding that the sale of Wewoka townsite to the Browns was invalid, and that the council had no power to ratify or confirm this illegal and void act (R. 105-106). This opinion states in part as follows (R. 105):

> "* * * The fact that the principal chief and his brother, member and secretary of the commission, became the purchasers, is, of itself, sufficient to raise a doubt of the bona fides of the transaction, even if it did not, of itself, render the sale invalid. Persons holding fiduciary relations, such as A. J. Brown did in respect of the sale of this townsite, are not as a rule permitted to become purchasers at their own sale. Without, however, considering this phase of the matter, it seems clear that the commission exceeded their authority in making this sale of substantially the whole townsite to John F. and A. J. Brown."

The Browns became alarmed at the possibility of losing this townsite property, and secured the insertion of a provision in the Indian Appropriation Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1068, confirming the sale to them. Thus, the Seminole Nation lost this valuable townsite property, and the Browns, Seminole tribal officers, secured it to themselves, and enriched themselves at the expense of the other members of the Seminole tribe.

The lower court finds and holds that there is no proof in the record to support the charges made in the Seminole protest of January 29, 1898, and the Seminole Memorial of 1901 (R. 35-36, 58-59). Both of these protests refer to this illegal townsite transaction of the Browns, and the proof

definitely shows that these charges are true (R. 34, 36, 100-106). As to the effort of the Browns to stifle the free expression of opinion among the Seminoles by Act of the Seminole Council, see R. 100, which substantiates the statement in the Memorial of 1901, that there was no free expression of opinion (R. 36).

The lower court refers to its decision in *Seminole Nation* v. *United States*, 92 C. Cls. 210 denying recovery to the Seminole Nation for the value of this townsite property. We believe that had the rule, that the conduct of the fiduciary must be judged by the most exacting fiduciary standards, been applied to the facts in this case, the decision would have been in favor of the Seminole Nation.

We submit that this townsite transaction shows that the Browns had an utter disregard for the rights and interests of the Seminole Indians in general; that they controlled and dominated the tribal council, and were able to secure whatever action they wanted from it. This transaction furnishes a striking example of the Browns enriching themselves at the expense of the other ignorant and helpless members of the Seminole Nation.

The Loyal Seminole Payment Matter

The lower court finds and holds that there is no proof in the record to support the charge of wrongdoing by Andrew Jackson Brown in the Loyal Seminole Payment matter (R. 36, 59). The lower court further states that the only thing reflecting upon Brown's conduct in this matter are the statements in the brief of P. L. Soper, Special Assistant United States Attorney, in excepting to the report of A. J. Brown, as administrator for the Seminole Indian claimants (R. 59).

The lower court has overlooked the fact that the report of Henry C. Lewis, an investigator for the Department of

Justice, deals with this very transaction. Lewis refers to the Soper exceptions, and substantially affirms the statements of Soper (R. 86-90). The statements of Soper were submitted to the Interior Department, and became a part of its records. The lower court points out that the action of the court on the exceptions is not shown by the record (R. 59). This is true. We endeavored to locate the Court file of this case, but found that the records had been shifted from place to place, and we were unable to find them. Evidently the Court did not approve Brown's report, and upheld the exceptions, for the Browns had to get legislation to smooth over the troubled waters, as they had done in the Wewoka townsite sale. They secured the insertion of the following provision in the Act of April 26, 1906, c. 1876, 34 Stat. 137, 140:

> "9. The disbursements, in the sum of one hundred and eighty-six thousand dollars, to and on account of the loyal Seminole Indians, by James E. Jenkins, special agent appointed by the Secretary of the Interior, and by A. J. Brown as administrator de bonis non, under an Act of Congress approved May thirty-first, nineteen hundred, appropriating said sum, be, and the same are hereby, ratified and confirmed; Provided, That this shall not prevent any individual from bringing suit in his own behalf to recover any sum really due him."

The Browns knew that this legislation would settle all of their difficulties, because the ignorant Seminole Indian claimants were wholly incapable of enforcing their own rights in the courts. It is doubtful whether they ever knew that Brown had secured this legislation, for the record shows that these claimants never received the money due them from this payment (R. 86-87, 110-111). Petitioner made an offer of proof to show that the amounts due several of these claimants were never paid by Brown. The lower

Court refused to receive this testimony (R. 110-111). We believe that this was error, under the circumstances above outlined.

The Browns' Arms Length Dealings with the Ignorant Members of the Seminole Nation

During this period the Brown brothers, half-breed Indians—particularly referred to in the reports of the Dawes Commission as controlling the affairs of the Five Civilized Tribes—were shrewd business men. They were officers of the Seminole Nation entrusted with the proper disbursement of the Seminole tribal income, on the one hand; and traders, dealing at arms length with the other ignorant and backward members of the Seminole Nation, on the other hand. They issued scrip to the Indians for annuities due them, and in anticipation of the annuity payment, at a discount of 10 per cent. The scrip was good for merchandise only at the Browns' stores, where prices were high. When the Seminole tribal income was credited to A. J. Brown, Seminole Treasurer, on the records of the Assistant Treasurer of the United States, at St. Louis, Mo., the Browns would rake it over into the tills of their stores. This was common knowledge throughout the Indian Territory.

The lower court states (R. 59): "There is no proof to show the Indians were required to take this scrip whether or not they wanted it." To support this conclusion the lower court relies upon a purported payroll for October, 1901, supposedly in the handwriting of A. J. Brown, showing that the Seminole Indians received both scrip and cash from the Browns for annuities due them. The lower court also refers to the explanation of this record by Allen W. Crain, and Mrs. John W. Wilmott, former employees of the Browns (R. 60). Mrs. Wilmott did not endeavor to explain this record, but merely identified the handwriting in

one of them as that of A. J. Brown (R. 108, 138). She readily admitted that she had nothing to do with the Seminole tribal books (R. 108, 138). With respect to these tribal books Mrs. Wilmott testified, "Nobody had anything to do with them except Mr. Brown" (R. 108). It is thus evident to the Court that Mrs. Wilmott knew nothing about the tribal books, and certainly could not testify as to what they contained.

Allen W. Crain endeavors to explain what the entries in this tribal record meant, but he admits that he had nothing to do with the making of this record (R. 108). The purported Payroll is dated October, 1901, and Crain testified that he did not work for the Browns until 1909 (R. 108), which was beyond the period of our claim, 1898-1907. Here again we have a witness endeavoring to testify with respect to records made at a time when he had nothing whatsoever to do with them, and of which he had no knowledge (R. 108). Yet the lower court has held (R. 60) that this type of testimony refutes the statements made by Congressman Flynn, of Oklahoma Territory, on the Floor of the United States House of Representatives in 1896 and 1897, showing that the Seminole Indians were required to accept Browns' due bills for moneys due them (28 Cong. Rec. 2070; 29 Cong. Rec. 1261).

It is a well settled principle of law that:

> "* * * books of account are received in evidence only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself made evidence in his own favor." (10 R. C. L., par. 372, p. 1174).

Therefore, we submit that Congressman Flynn's statements are not refuted by Brown's books of account, espe-

cially in view of the ample evidence in the record substantiating Flynn's statements, and showing that he depicted the true conditions existing within the Seminole Government at the time; and also in view of the unreliable nature of Brown's accounting, as evidenced by his account in the Loyal Seminole matter (R. 86-87).

The report of Henry C. Lewis, Investigator for the Department of Justice, shows that due to the ignorance of these Indians the system of credit used by the Browns was dishonest, and that the Seminoles never received any money from the Browns (R. 89). See also Soper's statements (R. 86-87).

The testimony of the Indians themselves, shows that they were unable to get cash from the Browns, and that when they asked for cash they received scrip only (R. 109, 111).

The testimony of disinterested white persons shows that when they bought scrip from the Indians for cash and at a discount, they could trade it out in merchandise at Browns' stores only, and that they didn't understand that they could get cash for it (R. 111-112). Certainly if this scrip could have been redeemed for cash, it stands to reason that white persons would have known about it, and would have traded it in for cash instead of merchandise.

The report of William L. Bowie, Special Investigator for the Interior Department, to the Superintendent of the Five Civilized Tribes, states that the Browns required the Indians to accept this scrip (R. 94).

Therefore, we have the reports of three of the Government's own investigators, the testimony of the Indians and disinterested white persons, all substantiating the statements of Congressman Flynn. Certainly Brown's books alone cannot properly be held to refute all of this evidence, and the lower court was in error when it found and held that the Seminoles were not forced to take Browns' scrip and that they could have gotten cash as well as scrip.

The lower court found that "the white men paid for the chokasutka the amounts for which the Indians were willing to relinquish it. The average exchange price appears to have been about 50 cents on the dollar, in terms of cash, for chokasutka, and somewhat higher when chokasutka was received for goods" (R. 31).

We submit that the lower court erred in this finding. The great preponderance of the evidence shows that the prices paid for scrip ranged from 10 to 50 cents on the dollar (R. 112); that "fifty cents was a pretty good price" (R. 112); and that the average cash price paid for scrip was 25 cents on the dollar (R. 112). The usual exchange price when the Indians traded out the scrip at stores other than the Browns was 50 cents on the dollar (R. 112).

The lower court further found that when the payments were received from agents of the United States the money was delivered to the Seminole Treasurer, A. J. Brown, with the full knowledge of the members of the Nation (R. 30).

The opinion of Assistant Attorney General, Willis Van Devanter (H. Doc., vol. 23, 57th Cong., 1st Sess., p. 231), dated July 12, 1898, shows that this Seminole income was deposited with the Assistant Treasurer of the United States, at St. Louis, Mo., to the credit of the Seminole Treasurer, and was not delivered by the agents of the United States to the Seminole Treasurer. As a matter of fact, the Seminoles knew nothing about the Seminole finances, and didn't know when the Browns collected this money (R. 113; Sen. Doc. 105, 55th Cong., 2 Sess., pp. 3-4).

The lower court further states as follows (R. 60, 61):

> "There is little, if any, credible evidence that exorbitant prices were charged for the merchandise sold * * *.
>
> * * * * * * *

> "We have a suspicion that higher prices were charged during the period in question, but there is no competent proof worthy of belief to show that they were exorbitant."

The lower court refers to the report made by D. H. Bynan, United States Probate Attorney, dated February 26, 1912, showing that some of the prices charged by the Wewoka Trading Company for merchandise were higher than those charged at another store in the vicinity (R. 60-61). With respect to the Indians' testimony, the lower court states (R. 61):

> "There is some testimony by several members of the Tribe that the Wewoka Trading Company did charge higher prices, but their testimony is so general and vague that it is of no real assistance."

We do not believe that the court should have waived aside the testimony of these Indian witnesses just because the testimony was general in nature. Because of the low state of mentality of the great majority of these Seminole Indians, they thought only in general terms. During the passage of time since this whole matter happened, it is little wonder that nothing but the general impression is left in the minds of these Indians. They were emphatic, however, in their testimony, that the prices charged by the Browns were greater than those charged by other stores in the neighborhood.

Paroah Deere, full blood Seminole Indian, testified as follows (R. 109):

> Q. "Could you or could you have not done better with money than you could with scrip in purchasing at the stores?
>
> "A. The reason why I wanted the money, there was a store man by the name of Thomas Skeally in Wetumka and at that time his merchandise was very much lower, and was at a price I could trade with and he didn't use

Chokasotka or scrip, and I wanted the money to use there.

"Q. How many miles is it from Wetumka over to Wewoka?

"A. It is over ten miles, I don't know just how much."

This is rather particular testimony. Other Indians testified generally that the prices at Browns' stores were higher than those charged by other stores in the vicinity (R. 112).

The testimony of the Indians is substantiated by the testimony of disinterested white men. M. H. Perkins testified that the Wewoka Trading Company's merchandise was marked about fifty per cent higher all the way along than other merchants (R. 112). Mr. E. C. Aldridge testified that after other stores came into existence in the community, the Browns' prices were higher by comparison (R. 112). In 1902, A. W. Crain, a well educated white man, and an adopted Seminole citizen, a brother-in-law of the Browns, wrote to Congressman Flynn that the merchants in the adjacent country towns in Oklahoma were selling better and cheaper goods than were the Browns' stores (R. 86).

On March 4, 1912, William Johnson, a white man, of Hazel, Oklahoma, wrote the Secretary of the Interior about the manner in which the Browns were then robbing the Seminoles of at least fifty per cent of their money by issuing them scrip good for merchandise only at their stores, where the prices were twenty-five per cent higher than other merchants (R. 91).

Thus, the great preponderance of the evidence shows that the prices charged by the Browns were higher than other stores in the vicinity.

The lower court admits in its opinion that it had a suspicion that the Browns charged higher prices for merchandise in their stores (R. 61). In *McCandless* v. *Furland*, 296 U. S. 140, 165, this Court held that the burden of proof

was on the fiduciary to show the fairness of the transaction in dealings between him and his ward, and further stated (p. 165):

> "* * * Many suspicious circumstances point to guilty knowledge and justify a holding that the burden has not been borne."

And in *Richardson's Executor* v. *Green*, 133 U. S. 30, 43, this Court, in passing on the same question, quoted from *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588, as follows:

> "* * * That a director of a joint stock corporation occupies one of those fiduciary relations where his duties with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the Courts, and may be set aside on slightest grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this Court and in others."

We believe that under the holdings of this Court a mere suspicion of wrongdoing on the part of the fiduciary would justify a decision in favor of the ward. Not only does the record raise a suspicion that Browns' prices were higher than other stores, but we submit the record clearly establishes the fact that the Browns did charge higher prices.

The lower court likens these ignorant and helpless Seminole Indians—upon which the white man's civilization was forced and which they were required to absorb in so short a time—to ignorant and shiftless white men in logging camps, mines, factories, tenant farmers, etc. (R. 61). The analysis clearly is not applicable to the case at bar wherein a fiduciary relationship exists between the parties. We submit that throughout this whole case the lower court has erred in failing to apply the rule laid down by this Court—that the conduct of the United States is to be judged by the

most exacting fiduciary standards (316 U. S. 286, 297). This Court quoted with approval from an opinion by Chief Judge (later Mr. Justice) Cardozo in *Meinhart* v. *Salmon*, 249 N. Y. 458, 464; 164 N. E. 545, 546, that:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions * * *. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

Clearly a rule applicable to a workaday world where white people deal with each other at arm's length has no application to the facts presented in this case, as was pointed out by this Court in its decision of May 11, 1942, 316 U. S. 286, 297.

The lower court further states that as soon as the Commissioner of Indian Affairs and the Secretary of the Interior had definite knowledge of this practice of the Browns, they put an end to it (R. 61, 63). To prove this conclusion the Court quotes from a letter of the First Assistant Secretary of the Interior to the Commissioner of Indian Affairs, dated April 26, 1906, stating in substance that the Department could not control the manner in which the Wewoka Trading Company transacted its business with the Seminole Indians, but that when the United States disbursing officer made payments to the Seminoles no member of the Wewoka Trading Company or any of its agents should be allowed to be present (R. 62-63). Thus, little if any action was taken to

curb the activities of the Browns after receipt of the report of Henry C. Lewis, Investigator for the Department of Justice. Let us examine the facts to determine whether the above conclusion of the lower court is correct.

It was not the result of the above letter of April 26, 1906 that the practice of turning Seminole moneys over to A. J. Brown, Seminole Treasurer, was discontinued. This action resulted directly from an opinion of the Attorney General, dated August 19, 1907, holding that under the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137, it became the duty of the Secretary of the Interior to disburse this Seminole tribal income directly to the Seminole Indians (26 Op. Attys. Genl. 340).

When in 1907 the United States began paying the Seminole tribal income by check directly to the individual members of the Seminole tribe, the Interior Department did nothing to stop the activities of the Browns. When the Browns lost direct control of the Seminole tribal income, they changed their methods theretofore used to secure these moneys themselves. They now began to use force to acquire the annuity checks paid to the Seminole Indians. They employed the former lighthorsemen—Indian police under the control of the Browns, who were much feared by the Indians, and who were armed with pistols, rifles, or clubs—as collectors for the Wewoka Trading Company. When the Indians received their annuity checks from the United States disbursing officer, they were met and collared by the lighthorsemen at the door of the paying office and marched over to the Wewoka Trading Company, where they were forced to endorse their checks over to the Browns for scrip then issued, or which had been issued, good only for merchandise at the Browns' stores. A discount of 20 per cent was now charged, and the prices charged by the Browns at that time were much higher than other stores in the vicinity. The Indians complained of these methods, and on several

occasions the annuity payments were stopped because of the activities of the Browns and their collectors. When the Indian refused to trade off his check for merchandise scrip, A. J. Brown choked it out of him on the street (R. 91-94, 108-109, 112). Whether or not the Indian owed the Browns for scrip previously issued, he was taken to the Wewoka Trading Company and his check was taken away from him by force by A. J. Brown, with the assistance of the lighthorsemen (R. 109).

This method was used by the Browns until the tribal money got low. The Browns then turned to fleecing other Indians, using their official positions "to advance their personal interests at the expense of the Indians under their authority." These activities resulted in the Interior Department's calling for their resignation (R. 94-95; *Seminole Nation* v. *United States,* 316 U. S. 286, 307).

Thus, the lower court's conclusion—that the Interior Department put a stop to Browns' activities by the letter of April 26, 1906—is clearly in error. In fact, the Department refused to take any effective steps to curb Browns' activities. When several protests of the improper conduct of the Browns were made in 1912 (R. 91-94), the United States Indian Superintendent at Muskogee, Oklahoma, wrote to John H. Wolf, as follows (R. 93-94):

> "The matter of the handling of this kind of a credit business by the Wewoka Trading Company has previously been investigated and reported to the Department, and it was held that it is not within the power of the Department to establish rules and regulations governing the manner in which merchants shall do business with the public in your country. Therefore, the only advice that I can give is that Indians, who do not feel that they should pay the prices charged by the Wewoka Trading Company for articles that they sell on credit, should not patronize their establishment, but do their trading at such places where they can procure the arti-

cles they need for a less price, if they can find such stores.

"What would be best for the Indians is to take care of the payments they receive in such a way, that they can as nearly as possible pay cash for the articles they need, and in this way avoid paying such large percentages to companies that do a credit business."

With the former lighthorsemen collaring these Indians after they received their checks, and marching them over to the Wewoka Trading Company, where they were forced to endorse them over to the Browns for due bills, issued at a 20 per cent discount, how was it possible for these Indians to get out of the clutches of the Browns to trade at other stores which sold goods for cheaper rates, and pay cash for them?

The record shows that the Interior Department shirked its plain duty to its Indian wards, by refusing to protect the payment of the Seminole tribal income, excusing its failure on the ground that it could not regulate the business methods used by the Browns and their Wewoka Trading Company in gobbling up this tribal income. Had the Interior Department, with the facts before it, exercised its duty as guardian and refused to turn over this Seminole tribal income to the Browns during the period 1898-1907, the Browns and their corrupt business methods would have been eliminated, and they would never, through the inaction of the United States Government, have succeeded in acquiring such power over these Indians. Clearly the inaction of the Interior Department permitted the Browns to continue these shameful practices.

Had the officers of the United States having charge of Indian Affairs, heeded the reports of the Dawes Commission, the Flynn Statements, the protests of the Seminoles, and the reports of the Government's own investigators,

t could have prevented these wrongs before and during he period the payments were made to these Seminole tribal fficials.

Certainly the respondent's conduct in continuing to pay hese tribal moneys over to the Browns at a time when it had nowledge of the facts, would not measure up to exacting duciary standards under the views expressed by this ourt.

The lower court has limited its findings and conclusions o the amount of Seminole income disbursed for headright ayments only during the period 1898-1907, but has failed o designate the amount so disbursed. Some findings should ave been made with respect to the moneys purportedly isbursed by the Browns for other purposes.

We submit that the lower court should have permitted etitioner to recover for the moneys thus turned over to the eminole tribal officials in view of the evidence presented in his case.

Case L-208

In fixing the value of the land in question the lower court iscarded the testimony of the witnesses, having reference o this particular land, and took as a basis for determining he values the sales of Indian lands under the Acts of Au- ust 15, 1894, c. 290, 28 Stat. 286, 295, and May 31, 1900, c. 98, 31 Stat. 221, 247, having no particular reference to the nds in question, and which were shown to have been ainted with fraud. We submit that the lower court erred n thus determining the value of this land.

The lands in question were generally good for agricultural nd grazing purposes (R. 113-115, 153). The prairie nds were worth from $10.00 to $40.00 per acre, and the ottom land was worth from $50.00 to $150.00 (R. 113-116). he lower court fixed the average value at but $7.00 per acre uring the period 1892 to 1913 (R. 39).

It is significant to notice that defendant produced seven witnesses on values, and that of these seven witnesses just three testified that the lands were worth under $10.00 an acre in their unimproved state (R. 115). Witness H. Barrett testified that you could purchase relinquishments from homesteaders who wanted to leave the country for $5.50 to $7.00 per acre in the early days (R. 115). The value of relinquishments certainly would not represent the value of the fee simple title to these lands. Witness Wiley testified that in 1900 he bought 80 acres of poor and unimproved land for $315.00 (R. 115). On the basis of this sale he estimated that the unimproved lands were worth $6.00 to $7.00 per acre during the period 1901-1909 (R. 115). Witness Youts bought land from non-resident Indians for $2.50 to $6.00 per acre, and based his determination of values on this consideration (R. 115-116).

The other four witnesses of respondent testified that the average value of the unimproved prairie lands was $10.00 per acre (R. 115-116), and $50.00 to $150.00 per acre for bottom land (R. 116); that improvements were meager in the early days (R. 116); that prairie land could be broken out for $1.25 to $4.00 per acre, and bottom land for $10.00 per acre (R. 116). Respondent's witness Bazhaw testified that when the white people got these lands away from the Indians they wanted $25.00 an acre, and up, for upland prairie land, and that the whites would use any method to get the Indian to sell it; that in 1901-1910, and 1914 the land was richer and more productive and sold at a reasonably good price: "It sold at war prices at the peak" (R. 116).

On the other hand plaintiff produced eleven witnesses who testified that the average value of the lands over the period 1892-1913 was $25.00 per acre. The prices fixed by plaintiff's witnesses ranged from $10.00 to $40.00 an acre for prairie land, and $75.00 to $100.00 for bottom land (R. 113-115).

Thus from the great preponderance of the evidence it is clear that the lower court fixed the values of these lands at an unreasonably low figure.

In determining the values the lower court stated (R. 68-69):

> "There is in the record, however, evidence more reliable than that of the testimony of witnesses as to values forty to fifty years prior to their testimony.
>
> "From 1895 to 1900, 1611.12 acres of the 10,351.82 were patented, and from 1901 to 1906, 4,411.32 acres were patented. During the years 1894 to 1901 the Pottawatomie and Absentee Shawnee Indians disposed of 90,447.86 acres, or about 1/6 of their allotments, at prices averaging $5.52 an acre, and the sales at these prices were approved by the Secretary of the Interior. From 1901 to 1906 they disposed of 67,841.82 acres at prices averaging $8.22 an acre, and the sales at these prices were approved by the Secretary of the Interior. This is a weighted average of $7.50 per acre. This seems to us the best evidence of the value of the lands during these two periods. * * *"

These considerations were received from the sale of Indian lands under the provisions of the Acts of August 15, 1894, c. 290, 28 Stat. 286, 295, and May 31, 1900, c. 598, 31 Stat. 221, 247, and are set forth in the Reports of the Commissioner of Indian Affairs of 1901, pp. 62-63; 1902, p. 67; 1903, p. 49; 1904, p. 67; 1905, p. 62; and 1906, p. 103.

Thus the lower court justified its determination by applying the prices paid for Indian lands sold under the above acts, which authorized non-resident Indians to sell their allotments, and also authorized resident Indians to dispose of a part of their allotments. These sales of Indian lands, and the small considerations given for them, would not reflect the true market value of the lands in question because they were not shown to have had any particular reference to these Seminole lands, and the reports of the Com-

missioner of Indian Affairs show that these sales were tainted with fraud (H. Doc. 5, 54th Cong., 1st Sess., Cong. Ser. 3382, pp. 87-88 265-266; H. Doc. 5, 54 Cong., 2nd Sess., Cong. Ser. 3489, p. 90; H. Doc. 5, 55th Cong., 3rd Sess., Cong. Ser. 3757, p. 101; H. Doc. 5, 58th Cong., 2nd Sess., Cong. Ser. 4645, p. 280).

In 1904, the Commissioner of Indian Affairs reported that (H. Doc. 5, 58th Cong., 3rd Sess., Cong. Ser. 4798, p. 67):

> "The sales of these lands have fallen off very much since the adoption of the amended rules, adopted October 7, 1903, which provided for sale under sealed bids."

In 1904 also, the United States Indian Agent for the Pottawatomies reported that (H. Doc. 5, 58th Cong., 3rd Sess., Cong. Ser. 4798, p. 310):

> "Approximately 13,160 acres of Indian land has been sold through this office during the past year for $260,061, this amount of money having been paid to the Indians of this reservation in addition to their lease and annuity money. The average price per acre of this land sold is about $20."

Therefore, it was not until 1903, when the Interior Department ordered that sales be made under sealed bids that the Indians began to receive the true values of these lands.

For the reasons above stated we do not believe that the lower court was justified in discarding the testimony of plaintiff's witnesses, and against the preponderance of all of the evidence, fixing an extremely low value, based upon sales of Indian lands tainted with fraud, and having no particular bearing on the lands in question.

We submit that the small considerations paid chiefly to nonresident Indians and in sales tainted with fraud, even though approved by the Interior Department, would not reflect the true market value of the lands in question; and

that the proper basis for determining this value would be the prices white men, dealing as equals, would pay for said lands in the open market.

The lower court further erred in fixing interest at the rate of 4 per centum per annum as the proper measure of increment to be added to the value of the lands to make plaintiff whole as of today for the taking which occurred during the period 1892-1913. Under this Court's decision in the Creek case, 295 U. S. 103, 111, the rate of 5 per centum per annum, as shown in the treaties and agreements with the Indians, was fixed as the reasonable rate. Seminole treaties and statutes dealing with Seminole trust funds show that five per centum per annum was paid by the United States on Seminole moneys held in trust by it (Treaty of March 21, 1866, 14 Stat. 755; Act of March 2, 1889, c. 412, 25 Stat. 980, 1004; Seminole Agreement, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567).

It is evident that the lower court erred in failing to fix this increment at 5 per centum per annum on the values of said lands, under the holding of this Court in the *Creek* case.

The lower court further erred in making the computation of the amount of interest it allowed at the rate of 4 per centum per annum. Interest on the value of the land, or $72,462.74, at 4 per centum per annum from 1899 to 1944, the date of judgment, amounts to $130,432.93, instead of $130,215.54, set forth in the Court's opinion (R. 69).

Gratuity Offsets

The petitioner believes that the lower court erred in holding that the amount of $175,000 disbursed by the United States under the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, constituted a gratuity offset under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

Petitioner contends that this payment was not a gratuity, but that Congress intended it to be reparation to the Semi-

noles for the Government's own error in locating them upon the wrong lands and causing them to make valuable improvements thereon.

The error in locating the Seminole Indians on the wrong land was solely that of the United States and cannot be charged to the Seminoles. The facts are set forth as follows:

By treaty of June 14, 1866, 14 Stat. 785, the Creek Nation ceded to the United States the west half of its entire domain, and retained the east half as its permanent national domain. Said lands were "to be divided by a line running north and south" (Article 3). By Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation purchased as its national domain 200,000 acres of the lands to be ceded by the Creeks, and located immediately west of and adjoining said Creek "dividing line".

Because of the homeless condition of the Seminoles growing out of the Civil War (they having been driven into Kansas as refugees)—before the Creek "dividing line" was established—the officers of the United States removed the Seminoles to and placed them upon what was believed to be the new 200,000-acre national domain granted to them in said Treaty of March 21, 1866, and respondent's officers encouraged them to settle down and make improvements as rapidly as possible (R. 106-107).

The Seminoles were promised that their new national domain would be surveyed in the fall of 1866, but this was not done (R. 106).

In 1868 the first attempt was made by the United States to survey the Creek "dividing line", which was also to be the eastern boundary of the Seminole 200,000-acre tract. In 1868 John C. Rankin surveyed this line. The Seminoles were shown this Rankin line by respondent's officers, and were told that this was their eastern boundary, and those

who were located east thereof were moved west of this line (R. 106). The Creeks objected to this survey, claiming that said line had been located too far east. The Seminoles became alarmed at the prospect of being forced to move again, but were assured by respondent's officers that they would not be disturbed even if the Rankin survey were found to be erroneous, and that they would be protected in their improvements in any event (R. 106-107; Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2). The Rankin survey was found to be erroneous and was not approved, but no immediate steps were taken by respondent to correct this error or to establish the correct Creek "dividing line" (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 5).

Finally, in 1871, the Creek "dividing line" was resurveyed and established by Frederic W. Bardwell, and this survey was approved by the Secretary of the Interior on February 5, 1872. This Bardwell line was placed 7 miles west of the Rankin line, and the large area between the two lines, then estimated at 175,000 acres and occupied by the Seminoles, was thrown within the boundaries of the Creek Nation. During the interval between the Rankin and Bardwell surveys the Seminoles had occupied this area believing, and being assured by respondent's officers, that this was a part of their new national domain, and upon these assurances had built homes and made other extensive and valuable improvements on these lands (Sen. Ex. Doc. 126, 51st Cong., 1 Sess., p. 9).

Disputes between the Creek and Seminole Nations arose over the jurisdiction of this area, and the United States Agent for the Seminoles, in his report to the Commissioner of Indian Affairs, dated September 25, 1872, stated as follows (1872 Rept. Comr. Ind. Aff., p. 241):

> "It is to be hoped that the Seminoles will be protected in their just title to their present homes, and

that the Government will urge upon the Creek authorities a speedy settlement of the disputed title of the Seminoles to the lands upon which the Government placed them, and which they have improved with more assiduity and care than their neighbors. Many of them are still in doubt whether their lands and improvements will be secured to them, and this uncertainty in this class of Indians is exceedingly discouraging and rests like an incubus upon their energies and labors.

"The Seminoles do not feel, and, I think, very justly, that they are a party in the settlement of this matter, excepting as a protesting party against their removal from this to a new country. They say that they purchased of the United States Government a certain amount of land, adjoining the Creek country on the west; that the Government showed them their boundaries, and located them, and told them this was to be their future home, and for them to go to work and improve it, and they have done so in good faith, and they are now happy and contented. And if their improvements have been made upon Creek soil, which is evidently the fact, the Government, and not they, is responsible, and they look to the Government to secure them in their rights and protect them in their present homes."

See also pages 36-37 of this same report.

The Act of March 3, 1873, c. 322, 17 Stat. 626, authorized negotiations with the Creek Nation for the cession of the 175,000 acres of its domain occupied by the Seminole Indians, the United States believing that such a purchase would cover all of the Creek lands occupied and improved by the Seminoles. On February 14, 1881, the Creek Nation ceded to the United States 175,000 acres of its domain for the use of the Seminole Nation, and by Act of August 5, 1882, c. 390, 22 Stat. 257, 265, Congress appropriated $175,000 to pay the Creek Nation for these lands.

The petitioner believes that Congress intended this payment to be reparation for the errors caused by the Government's own agents, and to protect the Seminoles in the valuable improvements they had made on these Creek lands in reliance upon the promises of the Government's own officers and agents. This contention is borne out by the action of Congress which was based upon the several reports before it at the time this settlement was made. A reference to Sen. Ex. Doc., No. 75, 47th Cong., 1st Sess., shows that the Commissioner of Indian Affairs and the Secretary of the Interior made several recommendations to Congress for the settlement of this controversy. One recommendation provided that the 175,000 acres be ceded to the Seminoles when they had relinquished to the United States in lieu thereof 175,000 acres of lands acquired by them under the Treaty of March 21, 1866. A draft of legislation to carry into effect this proposal was submitted with the recommendation.

However, an alternate proposal was submitted to Congress at the same time. In reporting on this purchase, and submitting a draft of legislation necessary to rectify this matter, Acting Commissioner of Indian Affairs, Thomas M. Nichol, recommended to the Secretary of the Interior, on February 18, 1881, in part as follows (Ibid., p. 7):

> "As shown in the foregoing, the homeless condition of the Seminoles, and their unwelcome occupation of lands belonging to another tribe, as well as the necessity of settling them somewhere as soon as possible, in order to enable them to commence to support their families, led the Government to locate them on what, at the time, was supposed to be the land that would enure to them, when the 'dividing line' should be surveyed, but which, upon the correct survey of the line, was found to be included in the Creek reserve. That they were thus erroneously located, is under the cir-

> cumstances, not to be wondered at, but certainly it was through no fault of the Seminoles, and the Government should therefore pay the Creeks for the lands sought to be purchased, and should also meet the expense of the survey thereof. The Seminoles certainly should not be required to do this, especially when it is considered that they received only fifteen cents an acre for the country relinquished by them in the treaty of 1866, while the United States paid the Creeks thirty cents per acre for the half of their domain ceded to the United States, and then charged the Seminoles fifty cents an acre for the part of the same land sold to them, and only after the lapse of nine years made up to them the difference in price."

A draft of legislation embodying this idea of settlement was submitted with this letter and was transmitted by the Secretary of the Interior to Congress.

Congress settled the matter by providing in the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, as follows:

> "To pay the Creek Nation of Indians for one hundred and seventy-five thousand acres of land now occupied by the Seminole Nation, the sum of one hundred and seventy-five thousand dollars, as per agreement made in pursuance of the act of March third, eighteen hundred and seventy-three, which agreement bears date February fourteenth, eighteen hundred and eighty-one, and is now on file in the Department of the Interior; said sum to be immediately available."

In adopting the above language without providing that the Seminole Nation be charged with this settlement of the matter, and providing for payment of the $175,000 from public funds, Congress rejected the first proposal and adopted the alternate proposal submitted by Acting Commissioner Nichol. It is thus evident that Congress considered this payment as a matter of reparation to the Semi-

noles for the errors made by the Government's own officers, and to protect the Seminoles in their improvements. Certainly this determination by Congress, made with all the facts before it, was a final settlement of the whole matter. There is no language in the Act of August 12, 1935, which indicates that Congress meant to reopen this settlement.

In its opinion the lower court held that the Government incurred no liability to the Seminole Nation because of the error of its officers in locating the Seminoles on the wrong land, and inducing them to make valuable improvements thereon upon promises of protection (R. 71). This holding is based upon the theory that the Government is not bound by the promises of its agents.

The lower court cites the case of *United States* v. *North American Company*, 253 U. S. 330, 333, in support of its holding (R. 71) that:

> "* * * No officer, of course, has the power to bind the United States, in the absence of congressional authority to do so, and it is not even contended that Congress authorized these officers to make any such promise nor that it directed them to locate the plaintiff tribe on the Creek lands."

A cursory glance at the above case will show that it has no application to the situation before us. The case arose under the general jurisdiction of the Court of Claims, and no fiduciary relationship existed between the parties. Here we are not suing the Government affirmatively for the errors of its officers, but we are defending against the lower court's allowance of a gratuity offset, which charged petitioner with the cost of correcting an error made by the Government's own officers. Certainly in defending against this gratuity offset petitioner has the right to show that it was not at all responsible for the condition in which the

Seminoles found themselves, but that the erroneous action of the Government's own officers—in locating these Indians on the wrong land, and encouraging them to make valuable improvements thereon, on the strength of the promises of the Government's own agents that the Seminoles would be protected in their improvements if error were discovered in their location—gave rise to the situation which Congress corrected by the passage of the Act of 1882.

As was said in the *Chickasaw Nation* v. *United States*, 94 C. Cls. 215, 234:

> "This is especially true in view of the fact that between the defendant and the plaintiff there existed a relationship similar to that of guardian and ward. The defendant had all the power; it could take such action as it saw fit. The very fact of that relationship calls for the utmost care to see that all the legal rights of the Indian tribes were protected."

The Government, through its officers, directed the location of the Seminoles on these lands; it alone is responsible for the error, and it should not be permitted to shift the cost of repairing the wrong upon the Indian ward, especially when Congress indicated its intention to accept the Government's responsibility for said error.

The lower court also cites the *Shoshone* case, 299 U. S. 476, 494, in support of its holding. In that case the acts of the Commissioner of Indian Affairs, an officer of the Government, in erroneously placing the Arapahoes on Shoshone lands, created the taking of these lands by the United States through the action and inaction of the executive and legislative branches; thus ratifying the error, and adopting the *de facto* appropriation of the land by relation as of the date of its beginning (*Ibid.*, p. 495). This Court

quoted from *Crosier* v. *Krupp*, 224 U. S. 290, 305, as follows (*Ibid.*, p. 496):

> "The adoption by the United States of the wrongful act of any officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statutes, a rightful appropriation by the Government, for which compensation is provided."

If the officers and agents of the United States, who were acting within the scope of their employment in moving the Seminoles on lands which were believed to be theirs, were without authority to bind the Government, when they made the error of locating the Seminoles on the wrong land and then made the promises that the Seminoles would be protected in their homes and other valuable improvements, and Congress made a settlement with the Seminole Indians in accordance with such promises and to rectify the error of the Government's agents, we submit that Congress adopted these promises as of the time they were made. The settlement made upon this basis clearly would be binding upon the United States, and would be final as between the parties.

We believe that the *Shoshone* case is authority in support of petitioner's position with respect to this $175,000 item—that this payment was made as reparation for the wrongs done the Seminoles by the Government's own officers, that Congress so intended it to be, and that it is not a gratuity offset under the Act of August 12, 1935.

Conclusion

Evidently the lower court has failed to appreciate the earnest effort of this Court to do justice to these Indian wards of our Government in settling the principles of law governing this case in its former decisions of May 11, 1942,

for on the retrial the lower court has disregarded these principles in the respects herein set forth.

We earnestly request that this Court grant a writ of certiorari to correct the many errors made by the lower court in the decision now presented for review.

Respectfully submitted,

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